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CREDITORS' COMMITTEES UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE: CREATION, COMPOSITION, POWERS, AND DUTIES*

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I. INTRODUCTION

During the past decade, Congress has reshuffled the roles and responsibilities of the parties to a Chapter 11 bankruptcy proceeding and, in so doing, has created an opportunity for creditors to play an important role in the debtor's reorganization.¹ In enacting the United States Bankruptcy Code,² Congress relieved the bankruptcy court of the burdens of administering Chapter 11 cases³ with the expectation that the creditors' committee would take a more active role in the day-to-day administration of the debtor's reorganization.⁴ In several recent Chapter 11 cases of national scope, creditors' committees have played a vital and often determinative role in the outcome of the debtors' reorganizations.⁵ However, in the ma-

* This article, originally published in 67 MARQ. L. REV. 491 (1984), re-examines the functions of creditors' committees in light of the statutory changes and developments in the case law that have occurred since its original publication.

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1. Under Chapter XI of the pre-Code law, creditors' committees played a very limited role. In fact, under pre-Code law the very creation of a committee of unsecured creditors was discretionary, not mandatory. Compare 11 U.S.C. § 1102(a) (1988) of the Code with 11 U.S.C. § 738 (1976) of the prior Act. Creation of a committee of creditors remains discretionary in liquidation proceedings under Chapter 7 of the Code. 11 U.S.C. § 705(a) (1988).

2. 11 U.S.C. §§ 101-1330 (1988).

3. See, e.g., section 341(c) of the Code, which provides that the court may neither preside at nor attend the first meeting of creditors, and subsection 1102(a)(1) of the Code which provides that the United States Trustee shall appoint the members of the creditors' committee.

4. Congress intended the creditors' committee to be the primary negotiating body to aid the debtor in its efforts to formulate a plan of reorganization and suggested that the committee, in conjunction with the trustee, would oversee the debtor's activities. H.R. Rep. No. 595, 95th Cong., 1st Sess. 401 (1977). See generally Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 BUS. LAW. 1309 (1979).

5. See, e.g., *In re Texaco*, 79 Bankr. 560 (S.D.N.Y. 1987).

jority of Chapter 11 cases, creditors' committees have fallen short of Congress's initial expectations and have failed to utilize the broad powers available to them.⁶

The introduction of the United States Trustee system,⁷ in conjunction with a growing familiarity among creditors of the potential power a committee can exert in the reorganization process, may well bring about changes in the degree creditors participate in Chapter 11 cases. Changes may also come about in the overall level of activity of creditors' committees.⁸ As more creditors grapple with the decision of whether to participate on a committee, counsel will be called with increasing frequency to explain the role and function of creditors' committees. Questions concerning a creditor's ability to challenge the committee's composition, reimbursement of committee members' expenses, the committee's ability to intervene in adversary proceedings or attack preferences, and potential liability to a creditor arising from committee participation, necessitate that counsel be prepared to educate and guide creditors who choose to play a role in the debtor's reorganization.

This article examines the committee's function in a Chapter 11 proceeding and focuses on the issues creditors and their counsel face at the various stages of a case. Finally, the authors provide a blueprint for a creditors' committee to follow to enable it to effectively use its statutory powers and play an active and influential role in the reorganization process.

II. CREATION AND COMPOSITION OF COMMITTEES

A. *Initial Appointment*

Section 1102(a)(1) of the United States Bankruptcy Code directs the United States Trustee⁹ to appoint a committee of creditors holding un-

6. See *infra* note 248. A committee's failure to play an active role in a reorganization proceeding may stem from a lack of experience, a lack of knowledge about the law, or a concern that a significant effort by the committee will not substantially improve the creditors' positions. In addition, counsel may be unwilling to devote substantial time to the committee out of concern that funds may not be available to pay expenses of administration, including counsel fees.

7. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 231 (1986) [hereinafter 1986 Amendments], expanded the role of the trustee by instituting, on a nationwide basis, a United States Trustee System similar to that found previously in the 18 "pilot districts" established in 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 408, 92 Stat. 2682 (1978). In the 1986 Amendments, Congress assigned to the trustee the duty to monitor the creditors' committee. 28 U.S.C. § 586(a)(3)(E), as amended by Pub. L. No. 99-554, § 113 (Oct. 27, 1986).

8. See *infra* note 250.

9. Prior to the 1986 Amendments to the Code, the court appointed the members of the creditors' committee. In its continuing effort to relieve the court of administrative duties, Congress

secured claims against the debtor as soon as practicable after the entry of an order for relief in a Chapter 11 case. The section also allows the U.S. Trustee to appoint such additional committees of creditors or equity security holders as the U.S. Trustee deems appropriate.¹⁰

Although the Code provides some guidance, the U.S. Trustee may exercise broad discretion when he or she appoints the members of the creditors' committee.¹¹ The Code suggests that committees of creditors appointed under subsection 1102(a) shall ordinarily consist of those "persons" with the seven largest "claims"¹² against the debtor, selected from those willing to serve.¹³ The Code also permits the U.S. Trustee to appoint to the official unsecured creditors' committee the members of a committee organized by creditors prior to the commencement of the case provided, however, the pre-filing committee was "fairly chosen" and is "representative" of the different kinds of claims against the debtor.¹⁴

removed the appointment of committee members from the court's province and gave this responsibility to the United States Trustee.

10. 11 U.S.C. § 1102(a)(1) (1988).

11. The U.S. Trustee acts as an independent officer in selecting the members of the committee; however, the U.S. Trustee may solicit information and suggestions concerning the committee's composition. *Van Arsdale v. Clemo*, 825 F.2d 794, 798 (4th Cir. 1987).

12. Pursuant to 11 U.S.C. § 521 and Bankruptcy Rule 1007(d), the debtor must file with the court a list of its creditors with the twenty largest claims. This list often serves as a starting point from which trustees notify creditors of the committee's creation. See, e.g., *In re Grant Broadcasting, Inc.*, 71 Bankr. 655 (Bankr. E.D. Pa. 1987) (trustee sent form orders to prospective creditors' committee members requesting them to accept or decline committee service).

13. 11 U.S.C. § 1102(b)(1) (1988). Although committees are usually comprised of the largest claim or interest holders, this is not always the case. In *Bank Creditors Group v. Hamill (In re White Motor Credit Corp.)*, 27 Bankr. 554, 557 (N.D. Ohio 1982), the district court affirmed the bankruptcy court's appointment of four small shareholders and two large shareholders to the equity security holder's committee pursuant to subsection 1102(b)(2). These shareholders were the only equity holders to respond to the request to serve on the committee. See also *In re A.H. Robins Co.*, 65 Bankr. 160, 163 (E.D. Va. 1986) (citing 5 COLLIER ON BANKRUPTCY ¶ 1102.01[2] (L. King 15th ed. 1986)), (the court held that the members of the creditors' committee did not render the committee unrepresentative), *aff'd* *Van Arsdale v. Clemo*, 825 F.2d 794 (4th Cir. 1987); *In re Featherworks Corp.*, 25 Bankr. 634, 644 (Bankr. E.D.N.Y. 1982) (bankruptcy court held that a creditor has no right to serve on the committee solely because it is one of the seven largest claim holders).

14. 11 U.S.C. § 1102(b)(1) (1988). Appointing a pre-existing committee to the official subsection 1102(a)(1) creditors' committee is often a quicker and cheaper method of forming a committee. Bankruptcy Rule 2007 sets forth the test used to determine whether the pre-filing committee meets the Code's requirements of being "fairly chosen" and "representative." Creditors on a committee formed prior to the debtor's filing would be well advised to follow the guidelines set forth in Bankruptcy Rule 2007, as well as the rules relating to proxies in Bankruptcy Rule 2006, to increase the likelihood that they will be appointed to the official unsecured creditors' committee if the debtor files.

The Code suggests that a creditor eligible to serve on a committee shall ordinarily be a "person."¹⁵ Prior to the 1984 Amendments to the Code,¹⁶ a "person," for purposes of the Code, did not include a governmental unit.¹⁷ As modified, however, subsection 101(35) includes within the definition of a person, solely for the purpose of appointment to a creditors' committee, "any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person"¹⁸

Courts have broadly construed the scope of a "claim" under the Code.¹⁹ Thus, holders of disputed claims,²⁰ secured and unsecured claims,²¹ and holders of claims for damages that are considered unmatured, unliquidated, and contingent²² are eligible to serve on the committee if they otherwise meet the requirements for membership.

A majority of courts have rejected attempts to distinguish between individual holders of claims against the debtor, and associations or representatives, such as labor unions or trustees of pension funds, which represent the individual claimants.²³ In *In re Altair Airlines, Inc.*,²⁴ the Third Circuit

15. 11 U.S.C. § 101(35) (1988). "Person" is defined in the Code to include an individual, partnership, corporation, and, under limited circumstances, a governmental unit. *Id.*

16. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) [hereinafter 1984 Amendments].

17. See, e.g., *Mansfield Tire & Rubber Co. v. Pension Benefit Guar. Corp.* (*In re Mansfield Tire & Rubber Co.*), 39 Bankr. 974 (N.D. Ohio 1983) (denying committee membership to wholly-owned government corporation serving as trustee for debtor's pension plan); *In re Baldwin-United Corp.*, 38 Bankr. 802 (Bankr. S.D. Ohio 1984) (denying Federal Deposit Insurance Corporation membership to creditors' committee); *In re American Atomics Corp.*, 2 Bankr. 526 (Bankr. D. Ariz. 1980) (denying school district membership to creditors' committee).

18. 11 U.S.C. § 101(35) (1988).

19. *Id.* at § 101(4); see also *Robinson v. McGuigan* (*In re Robinson*), 776 F.2d 30, 34-36 (2d Cir. 1985); see generally Matthews, *The Scope of Claims Under the Bankruptcy Code* (First Installment) 57 AM. BANKR. L.J. 221, 223-38 (1983).

20. See, e.g., *In re Richmond Tank Car Co.*, 93 Bankr. 504, 506 (Bankr. S.D. Tex. 1988); *In re Churchill Coal Corp.*, 31 Bankr. 115 (Bankr. S.D.N.Y. 1983).

21. Section 506(a) allows a partially secured creditor to divide its claim into secured and unsecured components, thereby permitting membership on the creditors' committee. See, e.g., *In re Walat Farms, Inc.*, 64 Bankr. 65, 68-69 (Bankr. E.D. Mich. 1986) (a creditor whose claim exceeded the value of its collateral, and thus held secured and unsecured claims, was eligible to serve on unsecured creditors' committee).

22. *In re Johns-Manville Corp.*, 57 Bankr. 680, 687 (Bankr. S.D.N.Y. 1986).

23. See, e.g., *In re Altair Airlines, Inc.*, 727 F.2d 88, 90 (3d Cir. 1984); *In re Chateaugay Corp.*, 104 Bankr. 626 (S.D.N.Y. 1989); see also Chassin, *Judicial Misinterpretations of Creditors' Committees*, 1 BANKR. DEV. J. 107, 115 (1984) (suggesting that union membership on creditors' committee is consistent with the goals of the Code). But see *In re Schatz Federal Bearing Co.*, 5 Bankr. 543, 547 (Bankr. S.D.N.Y. 1980) (court concluded that a labor union with a claim against the debtor based on the debtor's failure to fund a pension plan pursuant to a collective bargaining agreement could serve on the creditors' committee; however, the union could not serve on behalf

Court of Appeals held that the Airline Pilots Association International, which represented pilots who held wage claims against the debtor, was entitled to serve on the unsecured creditors' committee. The court noted that the union was an unincorporated association and, therefore, an "entity" within the meaning of subsection 101(9) of the Code.²⁵ The court also relied upon federal common law, which allows unions to sue to recover unpaid wages and vacation pay, to find that the union had a "claim" within the meaning of subsection 101(4).²⁶

Recently, the District Court for the Southern District of New York, in *In re Chateaugay Corp.*,²⁷ adopted the reasoning of *Altair*. In *Chateaugay*, a union brought an action against the debtor to redress alleged deprivations of rights under Title VII of the Civil Rights Act of 1964. The court found the union had asserted a claim for unpaid wages allegedly owed women union members due to the debtor employer's discriminatory conduct and, therefore, was eligible to serve on the creditors' committee.²⁸

Creditors appointed as members of committees often designate agents, such as attorneys, to serve on the committee on their behalf. However, when an attorney represents more than one creditor who is a member of the committee, the attorney may sit as a designee of only one of the creditors.²⁹ Although courts permit creditors to designate lawyers as their representatives on creditors' committees, they strongly encourage creditors to appoint persons engaged in business. Such persons, reason the courts, are likely to have greater insight into the business affairs of the debtor and, thus, be better able to assist the committee in fulfilling its functions.³⁰

of unpaid wage claims due its members under the Employee Retirement Income Security Act of 1974, as amended (ERISA)).

24. 727 F.2d 88 (3d Cir. 1984).

25. *Id.* at 90. The court stated that "Congress has recognized estates and trusts as persons, and thus as entities having claims against debtors. The representative capacity of such fiduciaries is essentially no different, for purposes of participation in a Creditors' Committee, than the representative capacity, under federal common law, of a labor organization." *Id.*

26. *Id.*; see also *In re Enduro Stainless, Inc.* 59 Bankr. 603 (N.D. Ohio 1986); *In re Northeast Dairy Co-op Fed'n*, 59 Bankr. 531 (N.D.N.Y. 1986). But see *In re Allied Delivery Sys.*, 52 Bankr. 85 (N.D. Ohio 1985) (bankruptcy court refused the union's application to become a member of the unsecured creditors' committee). Although the court acknowledged the union's claim for purposes of subsection 1102(a), it found that the union had failed to demonstrate that the committee was unrepresentative of the general unsecured creditors. In addition, the court noted that factors such as the adversarial relationship between the union and the debtor, and the union's filing of an unfair labor practice charge rendered the appointment of the union to the committee inappropriate. *Id.* at 86.

27. 104 Bankr. 626 (S.D.N.Y. 1989).

28. *Id.* at 635.

29. *In re M.H. Corp.*, 30 Bankr. 266, 267 (S.D. Ohio 1983).

30. *Id.*

B. *Changes in Committee Membership*

Prior to the 1986 Amendments, subsection 1102(c) gave the court the power, upon request of a party in interest, to change the membership or size of a committee that was not representative of the different kinds of claims or interests against the debtor. When Congress repealed subsection 1102(c), it created a gap in the Code and left an unanswered question as to how changes to the membership of existing committees could occur.³¹

The courts that have addressed this question have produced less than satisfactory answers. In *In re Public Service Co.*,³² the Bankruptcy Court for the District of New Hampshire expanded the existing creditors' committee by ordering the U.S. Trustee to appoint two additional debentureholder members.³³ Notwithstanding the deletion of subsection 1102(c) from the Code, the bankruptcy court concluded that it retains the power to alter the makeup of an existing creditors' committee. Although noting that the statutory amendments cast doubt on the court's power to affect the initial formation of the creditors' committee, the court asserted that its power to appoint a separate, additional committee of creditors necessarily includes the "inherent power to provide a 'lesser included remedy' of simply directing expansion of the existing committee."³⁴ This novel approach, if adopted by other courts, could dramatically enlarge the court's power to fashion remedies.

In *In re First RepublicBank Corp.*,³⁵ the Bankruptcy Court for the Northern District of Texas denied the creditors' committee's motion to remove one of its members from the committee. Without stating the statutory basis for the committee's motion, the court asserted that it had jurisdiction over the "core matter" pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2)(A), and (O).³⁶ The court went on to state that section 105(a) author-

31. See COLLIER ON BANKRUPTCY, ¶ 1102.01, at 1102-18 to 19 (15th ed. 1990) [hereinafter COLLIER] (stating that "the matter of the authority to alter the composition of the committee, and possible grounds for such action, now become issues to be resolved by the courts").

32. 89 Bankr. 1014 (D.N.H. 1988).

33. Although the court ordered the U.S. Trustee to appoint two additional debentureholders to the committee, it stated that the U.S. Trustee had "full discretion" in determining whom to appoint. *Id.* However, the court directed the U.S. Trustee not to accept recommendations from committee members who were not individual debentureholders and further "encouraged" the U.S. Trustee to "appoint individuals with prior Chapter 11 experience if at all possible." *Id.* at 1021.

34. *Id.* (quoting *In re Salant Corp.*, 53 Bankr. 158 (S.D.N.Y. 1985)).

35. 95 Bankr. 58 (N.D. Tex. 1988).

36. Subsection 157(b)(2) defines core proceedings to include, *inter alia*, (A) "matters concerning the administration of the estate" and (O) "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

ized the court, either on the motion of a party in interest or sua sponte, to review the U.S. Trustee's decision concerning committee composition.³⁷ However, the court added that unless issues of adequacy of representation are raised, questions concerning committee membership must, in the first instance, be directed to the U.S. Trustee.³⁸

In *In re Texaco, Inc.*,³⁹ the Bankruptcy Court for the Southern District of New York granted the debtor's motion to merge the members of two separate committees of unsecured creditors.⁴⁰ The court acknowledged that the Code does not address the elimination or merger of creditors' committees. Nevertheless, the court decided that requests to change the membership or size of a previously appointed committee should be addressed to the U.S. Trustee,⁴¹ and if the U.S. Trustee fails to act, the party in interest should apply to the court for relief.⁴² In an effort to justify its conclusion, the *Texaco* court construed the legislative history to the 1986 Amendments as implicitly continuing the bankruptcy court's authority to alter committee membership.

Although courts subsequent to the repeal of subsection 1102(c) have altered the committee's composition, the statutory basis for reconstituting a committee remains unclear. Section 1109 allows a party in interest to raise any issue in a case and be heard on that issue. This section may serve as the basis for parties to bring such challenges. However, the statutory basis for

37. *First RepublicBank*, 95 Bankr. at 60 (applying an arbitrary or capricious standard to its review of the trustee's performance of his administrative role); see also *In re Microboard Processing, Inc.*, 95 Bankr. 283 (D. Conn. 1989), a case filed prior to the repeal of section 1102(c) where, subsequent to the section's repeal, the debtor moved to reconstitute the membership of the creditors' committee. Both parties agreed that such relief was available under subsection 105(a) and FED. R. CIV. P. 60(b)(6) and the court, citing *Texaco*, asserted its authority to change the committee's composition. *Microboard*, 95 Bankr. at 284 n.1; cf. *In re Public Service Co.*, 89 Bankr. 1014 (D.N.H. 1988) and *In re Texaco, Inc.*, 79 Bankr. 560 (S.D.N.Y. 1987) (courts may de novo review propriety of trustee's appointment).

38. Cf. *Texaco*, 79 Bankr. at 566 (requests to modify committee membership may be made directly to the bankruptcy court).

39. *Id.* at 567.

40. *Id.* In *Texaco*, the court justified the merger of the oil and gas industry creditors' committee into the general committee on the basis of changed conditions, such as the reduced amounts owed the industry creditors, the dwindling number of industry committee members, and the "astronomical" administrative costs and expenses that separate committees entail. *Id.* at 566-67.

41. *Id.* at 565; see also *In re McLean Indus. Inc.*, 70 Bankr. 852, 856 (S.D.N.Y. 1987) (the court, recognizing that it no longer had the power to change committee membership, suggested that "[i]t would appear that a U.S. Trustee would have that power since he or she initially formed the committee"); COLLIER, *supra* note 31, ¶ 1102.01[3], at 1102-11 (stating that a party in interest who objects to the domination of the unsecured creditors' committee by holders of secured claims may request the United States Trustee to change the size or composition of the committee).

42. *Texaco*, 79 Bankr. at 566.

either the court's or the U.S. Trustee's power to reconstitute committees disappeared with the repeal of subsection 1102(c). Nevertheless, at least one court has stated that cases involving the removal of creditors from committees have established a "tenet that survives the repeal of subsection 1102(c)," namely, that "[a] committee member holding a conflict of interest cannot continue to serve."⁴³ This view, in addition to the resort by some courts to subsection 105(a) as the statutory basis for reconstituting committee membership, warrants a discussion of removal cases, notwithstanding the reliance of such cases on former subsection 1102(c).

Successful challenges to committee composition under former subsection 1102(c) typically involved impermissible conflicts of interest, risk of compromising information that was confidential as to the debtor because it involved committee deliberations, or risk of compromising confidential information concerning competitors because it involved the affairs of the debtor. Speculative conflicts of interest or interests adverse to other committee members, however, will not result in a successful challenge to a committee member absent some specific evidence that the member "breached or is likely to breach a fiduciary duty to, or has an actual impermissible conflict of interest with, the class of creditors represented by that member."⁴⁴

Insiders have generally, although not always, been barred from serving as committee members.⁴⁵ In *In re Swolsky*,⁴⁶ the Bankruptcy Court for the Northern District of Ohio removed from the creditors' committee a member whose wife was the office manager, bookkeeper, and vice-president of the debtor. The court stressed the risks to confidentiality of communication among committee members and concluded that the presence on the committee of either the creditor or his agent would have a "chilling effect on the

43. *First RepublicBank*, 95 Bankr. at 61.

44. *In re Microboard Processing, Inc.*, 95 Bankr. 283, 285 (D. Conn. 1989); see also *Texaco*, 79 Bankr. at 567; *In re Grant Broadcasting, Inc.*, 71 Bankr. 655, 664-65 (E.D. Pa. 1987); *In re Enduro Stainless, Inc.*, 59 Bankr. 603, 605 (N.D. Ohio 1986); *In re American Fed'n of Television and Radio Artists*, 30 Bankr. 772, 775 (S.D.N.Y. 1983) (bankruptcy court refused to remove from the committee a creditor who held 98% of the unsecured claims against the debtor).

45. In those jurisdictions in which the U.S. Trustee uses the debtor's list of its 20 largest creditors as the basis for selecting a committee, insiders are usually not appointed. Although the Code does not specifically exclude insiders from committee membership, Bankruptcy Rule 1007(d) excludes insiders from the debtor's list of 20 largest creditors.

46. 55 Bankr. 144 (N.D. Ohio 1985); see also *In re Johns-Manville Corp.*, 26 Bankr. 919, 925 (S.D.N.Y. 1983); *In re Glendale Woods Apartments, Ltd.*, 25 Bankr. 414 (Bankr. D. Md. 1982); *In re Daig Corp.*, 17 Bankr. 41 (Minn. 1981) (court removed a creditor whose father was the chairman of the board of the debtor); *In re Penn-Dixie Indus., Inc.*, 9 Bankr. 941 (S.D.N.Y. 1981) (an appointee to the equity committee who also sat on the board of directors of the debtor was challenged and removed from the committee). In all of these cases the respective courts stressed the need to protect the confidentiality of committee proceedings.

other members"⁴⁷ and would result in a committee that was not representative of the different types of claims or interests to be represented.

In contrast, the United States Bankruptcy Court for the District of Vermont in *In re Vermont Real Estate Investment Trust*⁴⁸ refused to deny committee membership to the wife of the former executive officer of the debtor, who was an insider under subsection 101(25) of the Code. The insider creditor was also a co-defendant with her husband in a state lawsuit alleging fraudulent involvement in certain of the debtor's prior activities.⁴⁹ The court analyzed subsection 1102(b)(1) and found that because insiders were not specifically excluded from service on the committee, the petitioning creditor was entitled to membership.⁵⁰ Although the court required the creditor to refrain from participating in any committee discussions regarding her lawsuit against the debtor,⁵¹ it seemed unconcerned about other confidential communications to which she might be privy, even though the court noted that the objecting creditors were concerned about the risk to confidentiality in general.⁵² Precluding insiders from sitting on a committee under any circumstances is the better reasoned view because the success of a reorganization proceeding may depend on the aggressive and sometimes adversarial participation of a committee relying upon confidential information.

Protecting information that is confidential as to competition was at issue in *In re Wilson Foods Corp.*,⁵³ where an Oklahoma bankruptcy court denied a direct competitor's request that it be permitted to serve on the creditors' committee. The debtor contended that the creditor's service on the committee would impair its ability to deal candidly with the committee. The court agreed, and added that if the competitor did not take advantage of confidential information gained through committee membership, the competitor's shareholders might have cause to complain. The court stated,

47. *Swolsky*, 55 Bankr. at 146.

48. 20 Bankr. 33 (D. Vt. 1982).

49. Unproven allegations of fraud have been held not to be sufficient cause to warrant removal from a committee. See *infra* note 62 and accompanying text.

50. *Vermont Real Estate Inv. Trust*, 20 Bankr. at 35.

51. *Id.* at 36.

52. *Id.* at 33; see also *In re Nyack Autopartstores Holding Co.*, 98 Bankr. 659 (S.D.N.Y. 1989) in which the court allowed a creditor to continue service as the committee's chair despite his being a cousin of the debtor's principal operating officer. Citing *Vermont Real Estate Inv. Trust*, the *Nyack* court stated that subsection 1102(b)(1) does not exclude an insider from committee service "if the insider holds one of the seven largest claims against a debtor." *Id.* at 661; cf. *In re Featherworks Corp.*, 24 Bankr. 634, 644 (E.D.N.Y. 1982) (creditor has no right to committee membership just because it holds one of the seven largest claims).

53. 31 Bankr. 272 (W.D. Okla. 1983).

"[c]onflicting interests and divided loyalties have no place on a committee of creditors."⁵⁴

Other courts have disagreed with the *Wilson* court's ban on competitors serving on the creditors' committee. In *In re Penn-Dixie Industries, Inc.*,⁵⁵ the United States Bankruptcy Court for the Southern District of New York permitted a creditor to retain its committee seat, even though the creditor had filed documents⁵⁶ with the Securities and Exchange Commission disclosing its intention to acquire ownership of the debtor. The court found the likelihood of the creditor's misuse of confidential information to be purely speculative, and concluded that the Rules of Bankruptcy Procedure contained provisions that could be invoked to protect against disclosures of confidential information or breaches of fiduciary duties.⁵⁷

Similarly, the court in *In re Plant Specialties, Inc.*,⁵⁸ approved the appointment of a representative of the debtor's competitor to the creditors' committee. The court so ruled despite the debtor's objection that such an appointment would create an impermissible conflict of interest between the creditor's fiduciary duties to its constituent creditors and its individual self-interest. The debtor also alleged that its trade secrets, such as customer lists, would be exposed if the competitor served on the committee. The court rejected the debtor's arguments and concluded that the debtor had failed to meet its burden of demonstrating how the competitor's appointment would be "detrimental to [the debtor's] reorganization efforts."⁵⁹ In fact, the court went so far as to suggest that the competitor's presence on the committee might actually prove to be to the debtor's advantage, given the competitor's familiarity with the industry and his unique insight into the debtor's affairs.⁶⁰

Absent either an overt threat to confidential information or other blatant conflict of interest,⁶¹ courts generally have not modified the member-

54. *Id.* at 272.

55. 9 Bankr. 936 (S.D.N.Y. 1981).

56. *Id.* at 937.

57. *Id.* at 940.

58. 59 Bankr. 1 (W.D. La. 1986).

59. *Id.* In finding no "detriment" to the debtor, the court distinguished *Wilson* by noting the dissimilarity of the facts in the two cases. Unlike *Wilson*, the competitor in *Plant* owned all of the stock in its company and, therefore, would not be pressured by fellow stockholders to act in a manner inconsistent with his duty to the committee. The court also took note of the competitor's grasp of his fiduciary duty to all creditors as well as the competitor's previous knowledge of the debtor's customer lists. *Id.* at 2.

60. *Id.*

61. See, e.g., *In re Richmond Tank Car Co.*, 93 Bankr. 504, 508 (S.D. Tex. 1988) (creditor's disputed claim and the fact that the parties were involved in pending state court litigation did not create conflict of interest warranting creditor's exclusion from the committee).

ship of a creditors' committee. Unproven allegations of fraud have been held insufficient cause to deny committee membership to a creditor.⁶² Nor has the existence of strong and diverse views,⁶³ or the lack of sympathy for the debtor's reorganization efforts, persuaded a court to remove a committee member. In *In re M.H. Corp.*,⁶⁴ an attorney representing a number of creditors stated at the first meeting of creditors, at which the committee was to be formed,⁶⁵ that his clients would object to any plan the debtor proposed and would prefer to see the debtor liquidated under Chapter 7. The debtor's counsel objected vigorously to both the creditors' and the attorney's membership on the committee. The Ohio bankruptcy court, noting that the Code did not preclude committee membership to unsympathetic parties, refused to deny the appointment.⁶⁶

C. Committees in Addition to the Official Creditors' Committee

The U.S. Trustee may appoint the official creditor's committee and any additional committees at his or her discretion.⁶⁷ Additionally, subsection 1102(a)(2) provides that, upon the request of a party in interest,⁶⁸ the court may order the U.S. Trustee to appoint additional committees of creditors or of equity security holders if necessary to insure their adequate representa-

62. See, e.g., *Vermont Real Estate Inv. Trust*, 20 Bankr. 33; *In re Bennett*, 17 Bankr. 819 (D.N.M. 1982); *In re Kontaratos*, 10 Bankr. 373 (D. Me. 1981) (judge was sufficiently concerned about allegations of fraud (the charging of interest at 350% per annum) to direct the United States Trustee to investigate the charges. The First Circuit Bankruptcy Appellate Panel reversed, stressing that such allegations had to be proved by resort to the adversarial system. *In re Kontaratos*, 15 Bankr. 298, 301 (1st Cir. 1981)).

63. In *Public Service*, 89 Bankr. 1014, the creditors' committee voted to remove (and the United States Trustee complied) one of its members who had expressed strong views concerning the controversial Seabrook Nuclear Plant. Although the court noted that the member's views were "strong" and the member was perhaps "even a little obnoxious in expressing the same," the court stated that "the existence of strong and diverse views is not per se a disqualification for service on a creditors' committee in a Chapter 11 proceeding." *Id.* at 1019.

64. 30 Bankr. 266 (S.D. Ohio 1983).

65. The first meeting of creditors is held pursuant to 11 U.S.C. § 341 (1988).

66. *M.H. Corp.*, 30 Bankr. at 267.

67. 11 U.S.C. § 1102(a)(1) (1982 & Supp. 1988).

68. A Chapter 11 debtor can be a party in interest for purposes of requesting the appointment of an additional creditors' committee pursuant to subsection 1102(a)(2). *In re Bible Speaks*, 69 Bankr. 72, 73 (Bankr. D. Mass. 1986). Prior to the repeal of subsection 1102(c), parties in interest for purposes of challenging committee composition included the debtor, *Penn-Dixie*, 9 Bankr. at 939, other creditors, *Vermont Real Estate Inv. Trust*, 20 Bankr. at 35, and the United States Trustee in pilot districts, *In re Daig Corp.*, 17 Bankr. 41, 42 (D. Minn. 1981). Although not specifically required by the Code, a party requesting the appointment of an additional committee under subsection 1102(a)(2) should provide notice of such request to the trustee or debtor, the creditors' committees, and the United States Trustee, and these parties should be provided an opportunity to be heard on the issue. COLLIER, *supra* note 31, ¶ 1102.02, at 1102-21.

tion in the case.⁶⁹ A committee appointed pursuant to subsection 1102(a)(2) enjoys the same rights and duties as committees appointed pursuant to subsection 1102(a)(1).⁷⁰

The Securities and Exchange Commission, which under subsection 1109(a) has the specific right to be heard on any issue in a case, frequently requests the appointment of an equity security holders' committee in cases involving large numbers of equity holders.⁷¹ Although an equity security holders' committee is the only type of additional committee specifically mentioned in subsection 1102(a)(2), courts have broadly construed the section's grant to create "additional committees of creditors" to include committees of secured creditors,⁷² priority creditors,⁷³ subordinated note holders,⁷⁴ undivided interest holders,⁷⁵ property holders,⁷⁶ finance fund certificate holders,⁷⁷ labor representatives,⁷⁸ tort claimants,⁷⁹ asbestosis litigants,⁸⁰ hourly employees,⁸¹ retirees,⁸² and industry competitors.⁸³

69. The court's decision to order the appointment of additional committees is discretionary; the Code neither mandates nor precludes the creation of additional committees. *In re Salant*, 53 Bankr. 158 (Bankr. S.D.N.Y. 1985); see also *McLean*, 70 Bankr. at 856-57; and *Texaco*, 79 Bankr. 560, 566 (holding that creditors seeking the appointment of an additional committee may apply directly to the bankruptcy court). The court decides de novo whether an additional committee should be appointed. But see *First Republic Bank*, 95 Bankr. at 60-61 (applying arbitrary and capricious standard of review to trustee's decision whether to appoint additional committees).

70. *In re Evans Prod. Co.*, 58 Bankr. 572, 575 (S.D. Fla. 1985).

71. See, e.g., *In re White Motor Credit Corp.*, 27 Bankr. 554 (N.D. Ohio 1982); see also *In re Emons Indus., Inc.*, 50 Bankr. 692, 694 (S.D.N.Y. 1985) (court refused to appoint an equity committee in a case involving a "hopelessly insolvent" debtor, noting that "neither the debtor nor the creditors should have to bear the expense of negotiating over the terms of what is in essence a gift").

72. See, e.g., *In re Diversified Capital Corp.*, 89 Bankr. 826, 828-30 (C.D. Cal. 1988); *In re Fidelity Am. Mortgage Co.*, 19 Bankr. 568 (E.D. Pa. 1982) (secured noteholders' committee approved); *In re Combustion Equip. Assocs., Inc.*, 16 Bankr. 354 (S.D.N.Y. 1982). But see *In re Wekiva Dev. Corp.*, 22 Bankr. 301, 302 (M.D. Fla. 1982) (court declined to appoint a secured creditors' committee, noting the lack of identity of interests).

73. See, e.g., *In re National Equip. & Mold Corp.*, 60 Bankr. 133 (N.D. Ohio 1986).

74. See, e.g., *In re Nova Real Estate Inv. Trust*, 10 Bankr. 90 (S.D. Fla. 1981).

75. See, e.g., *In re Bear Lake W., Inc.*, 32 Bankr. 272 (D. Idaho 1983).

76. See, e.g., *In re Cloud Nine, Ltd.*, 3 Bankr. 202 (D.N.M. 1980).

77. See, e.g., *In re Western Farmers Ass'n*, 8 Bankr. 539 (W.D. Wash. 1981).

78. See, e.g., *In re Wickes Companies*, No. LA-82-06657-WL (Bankr. C.D. Cal., July 15, 1983).

79. See, e.g., *In re A.H. Robins Co.*, 65 Bankr. 160 (E.D. Va. 1986); *In re Farm Bureau Servs., Inc.*, 32 Bankr. 69 (E.D. Mich. 1982).

80. See, e.g., *In re Johns-Manville Corp.*, 26 Bankr. 420 (S.D.N.Y. 1983); *In re UNR Indus.*, 23 Bankr. 144 (N.D. Ill. 1982); see also *In re Johns-Manville Corp.*, 60 Bankr. 842, 843 (S.D.N.Y. 1986) (bankruptcy court appointed additional committees of institutional and trade creditors, co-defendants of the asbestos manufacturers seeking contribution or indemnity, asbestos health related claimants and a committee of legal representatives of future health claimants), *rev'd on other grounds*, 801 F.2d 60 (2d Cir. 1986).

A party in interest seeking the appointment of an additional committee must prove the necessity for the additional committee as well as the failure of the existing committee or committees to adequately represent all creditors or equity security holders.⁸⁴ If the party meets its burden, the opponent must then show that the costs resulting from an additional committee significantly outweigh the concern for adequate representation and cannot be alleviated by other means. The nature of the case, the composition of the committee, the presence of conflicts among creditors, and the delay and costs arising from duplication of professional services are among the factors the court weighs in determining whether to appoint an additional committee.⁸⁵

In *In re Sharon Steel Corp.*,⁸⁶ the Bankruptcy Court for the Western District of Pennsylvania vacated the United States Trustee's Notice of Appointment of Committee of Debentureholders. In refusing to allow the creation of an additional committee of debentureholders, the court recognized that conflicts among creditors, are common in any committee, but that "adequate representation exists through a single committee as long as the diverse interests of the various creditor groups are represented on and have participated in that committee."⁸⁷ The court noted that the appointment of separate committees is an "extraordinary remedy," and emphasized its concerns that separate committees often complicate negotiations, add delay to the reorganization process, and add an additional layer of administrative

81. See, e.g., *In re Mesta Mach. Co.*, 67 Bankr. 151, 156 (W.D. Pa. 1986).

82. See, e.g., *In re Patrick Cudahy, Inc.*, 88 Bankr. 895 (E.D. Wis. 1988).

83. See, e.g., *In re Texaco, Inc.*, 73 Bankr. 960 (S.D.N.Y. 1987).

84. A party seeking the appointment of an additional committee may apply directly to the court for such relief and need not make an initial request to the trustee. *In re Sharon Steel Corp.*, 100 Bankr. 767, 776 (W.D. Pa. 1989); *Texaco*, 79 Bankr. at 566; *McLean*, 70 Bankr. at 857-58. Challenges to the representativeness of the official creditors' committee should be made promptly after the U.S. Trustee appoints the committee. In *Van Arsdale*, 825 F.2d at 797, the court denied a challenge to the representativeness of the official creditors' committee on the grounds that the challenge, filed seven weeks following appointment, was untimely. Important decisions had been made regarding the selection of attorneys and the formation of negotiation strategy and the challengers offered no reason for their delay in petitioning the court for an additional committee. *Id.* However, in *In re Diversified Capital Corp.*, 89 Bankr. 826, 831 (C.D. Cal. 1988), the court allowed the appointment of an additional committee of secured creditors even after the confirmation of the plan but prior to its consummation. Given the widely shared concerns with delay, disruption, and added cost, it appears unlikely that many courts would abide by the practice of appointing committees in the later stages of the debtor's reorganization.

85. *In re Sharon Steel Corp.*, 100 Bankr. 767 (W.D. Pa. 1989); *In re McLean Indus. Inc.*, 70 Bankr. 852 (S.D.N.Y. 1987); *In re Beker Indus. Corp.*, 55 Bankr. 945, 948-49 (S.D.N.Y. 1985).

86. 100 Bankr. 767 (W.D. Pa. 1989).

87. *Id.* at 777-78; see also *In re First Republic Bank Corp.*, 95 Bankr. 58 (N.D. Texas 1988); *In re Walat Farms, Inc.*, 64 Bankr. 65 (E.D. Mich. 1986).

expense on the debtor's estate.⁸⁸ The *Sharon* court added that separate committees and the separate teams of professionals they entail "rarely contribute to the spirit of compromise that is intended as the guiding star of Chapter 11."⁸⁹

One of the major factors affecting a court's decision to appoint multiple committees is the increased expense to the estate.⁹⁰ The costs and expenses of a committee,⁹¹ as well as those of its counsel and other professional persons employed by it under Section 1103 of the Code, constitute administrative expenses under Section 503. The expenses are, therefore, entitled to priority under Section 507 of the Code; they will be paid before the claims of unsecured creditors. While in very large cases the direct impact on unsecured creditors may be relatively minor, in small to medium-sized cases the appointment of multiple committees could have a significant effect on the ultimate distribution to unsecured creditors.⁹²

When additional committees are appointed, their fees and expenses are entitled to equal priority with the fees and expenses of the unsecured creditors' committee. In *In re Wilnor Drilling, Inc.*,⁹³ the United States District Court for the Southern District of Illinois reversed the bankruptcy court's ruling that the fees and expenses of the investors' committee were subordinate to those of the official creditors' committee. Although the court acknowledged that the appointment of a creditors' committee was mandatory while the appointment of other committees was discretionary, it held that factor alone was insufficient to warrant subordination of the investors' committee's expenses. The court concluded that the Code did not distinguish between the fees and expenses of various committees, and although the court had the power to equitably subordinate claims because of fraud, bad faith, or inequitable conduct, those factors were not present.⁹⁴

88. *Sharon Steel Corp.*, 100 Bankr. at 778-79.

89. *Id.* at 778.

90. See, e.g., *Beker*, 55 Bankr. at 949; *In re Shaffer-Gordon Assocs., Inc.*, 40 Bankr. 956 (E.D. Pa. 1984); *In re Baldwin-United Corp.*, 45 Bankr. 375 (S.D. Ohio 1983).

91. There is a split of authority on whether committee members are entitled to reimbursement of expenses incurred in connection with a case. See *infra* notes 201-15 and accompanying text.

92. See, e.g., *In re Beker Indus. Corp.*, 55 Bankr. 945 (S.D.N.Y. 1985) (court appointed an additional committee, emphasizing the size and complexity of the case, but nevertheless required the newly-appointed committee to take steps to minimize duplication of the official committee's efforts and to keep a close watch on the fees and expenses it incurs); see also *In re Shaffer-Gordon*, 40 Bankr. 956 (E.D. Pa. 1984).

93. 29 Bankr. 727 (S.D. Ill. 1982).

94. *Id.* at 730-31.

D. Overlapping Committees

The courts are divided as to whether separate committees should be appointed for each debtor in cases that are being jointly administered but which have not been substantively consolidated. In *In re Lee*,⁹⁵ the court stated that it was "presumed improper" to appoint a single creditors' committee in related bankruptcy cases. In *In re White Motor Credit Corp.*,⁹⁶ an Ohio bankruptcy court which refused to appoint a single committee in six related Chapter 11 cases commented that without separate committees, "[t]he presence of disinterested yet voting members could easily divert attention from legitimate committee activities (Section 1103) and chill the initiative which, hopefully, has been brought to the reorganization environment."⁹⁷

In contrast, the Bankruptcy Court for the Southern District of New York in *In re McLean Industries, Inc.*,⁹⁸ rejected a per se rule that the filing of a joint case necessarily mandates multiple committees.⁹⁹ The *McClean* court noted Congress' failure to address the appropriateness of multiple committees in the context of jointly administered cases. Although it recognized the concern that a single committee not be unjustly dominated by the creditors of any one debtor, the court cautioned that the costs of mandatory separate committees "could be extreme."¹⁰⁰ The court ordered an evidentiary hearing to determine whether a single creditors' committee could meet the statutorily mandated test or adequate representation of the debentureholders in four jointly administered but unconsolidated cases involving related corporate debtors.

95. 94 Bankr. 172, 180 (C.D. Cal. 1988).

96. 18 Bankr. 720 (N.D. Ohio 1980).

97. *Id.* at 722; see also *In re Parkway Calabasas Ltd.*, 89 Bankr. 832 (C.D. Cal. 1988) (presumed improper to appoint single creditors' committee or same counsel for creditors' committees in bankruptcy cases involving multiple debtors where creditors treated debtors as economic unit, debtors' affairs substantially overlapped and conflicts of interest among creditors were possible).

98. 70 Bankr. 852 (S.D.N.Y. 1987).

99. *Id.* at 862; see also *Salant Corp.*, 53 Bankr. at 161, (court refused to appoint separate committees for three affiliated debtors with the same institutional creditors unless it could be shown that a single committee could not function adequately). See generally Meir & Brown, *Representing Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 56 AM. BANKR. L.J. 217, 221 (1982).

100. *McLean*, 70 Bankr. at 862.

III. POWERS AND DUTIES OF COMMITTEES

A. *Appointment and Compensation of Counsel and Other Professionals*

Section 1103 enumerates the powers and duties entrusted to creditors' committees.¹⁰¹ To assist the committee in performing its multifaceted role in the reorganization process, Congress granted committees the power to employ professionals.¹⁰² At a scheduled meeting attended by the majority of its members, the committee can authorize¹⁰³ the retention of attorneys,¹⁰⁴ accountants,¹⁰⁵ and other agents to represent and perform services for the committee.¹⁰⁶ However, the ultimate employment of the professionals selected is subject to prior court approval.¹⁰⁷

Although the committee enjoys broad freedom in selecting professionals and agents, it does not have unfettered discretion. Subsection 1103(b) provides that a person employed by a committee may not represent any other entity having an adverse interest in connection with the case.¹⁰⁸ Prior to the 1984 Amendments, this section barred an attorney employed by a com-

101. 11 U.S.C. § 1103 (1988).

102. *Id.* § 1103(a).

103. Although the Code does not precisely dictate voting procedure, one court has held that the votes of a majority number of creditors holding more than one-half in amount of claims represented is required to select counsel. *In re Outdoor Displays Welding & Fabrication, Inc.*, 76 Bankr. 860, 862 (Bankr. S.D. Ga. 1987).

104. The Code neither advocates nor prohibits the practice of retaining more than one attorney for the committee. Although a committee, with the court's approval, may employ more than one attorney, the legislative history suggests that such practice should "be the exception, and not the rule." H.R. Rep. No. 595, 95th Cong., 1st Sess. 402 (1977). See generally COLLIER, *supra* note 31, ¶ 1103.01, at 1103-04.

105. Although committees may not always choose to hire accountants, complex cases may warrant the appointment of separate accountants for separate committees of creditors. See, e.g., *In re Michigan Gen. Corp.*, 78 Bankr. 479 (N.D. Tex. 1987); *In re Saxon Indus., Inc.*, 29 Bankr. 320, 322 (S.D.N.Y. 1983) (court authorized equity security holders' committee to hire separate accountants). Collier suggests that where the debtor remains in possession and has a 120-day exclusive period within which to file a plan of reorganization, the court should defer its decision of whether to allow the committees to employ separate accountants unless the committee can show the debtor's accountants are acting in a circumspect manner. COLLIER, *supra* note 31, ¶ 1103-05.

106. However, the committee may not employ one of its current members. *In re Automotive Nat. Brands, Inc.*, 65 Bankr. 412, 413 (W.D. Pa. 1986).

107. *Id.* at 414. Bankr. Rule 2014(a) requires the committee's application for the employment of a professional to state the need for hiring a professional, the professional's name, the reasons for the selection, the professional services to be rendered, proposed compensation, and the names of persons connected with the case. The person to be hired also must submit a statement of his or her connection to the debtor, creditor, or parties in interest. See also Bankruptcy Rule 5002, which prohibits appointment of a professional who is a relative of or is connected with the bankruptcy judge who approves the appointment.

108. 11 U.S.C. § 1103(b) (1988).

mittee from representing any other entity connected with the case.¹⁰⁹ The obvious danger which the section sought to avert was the creation of an irreconcilable conflict of interest in the event the committee and the second entity took polar positions on issue.¹¹⁰

As amended, however, subsection 1103(b) opens the possibility for the committee to employ an attorney notwithstanding the fact that the attorney represents members of the committee in connection with the case. The section does limit such dual representation to those cases where the other party represented does not have an "interest adverse"¹¹¹ to the interest of the committee.¹¹² As the Bankruptcy Court for the Northern District of Indiana stated in *In re Whitman*,¹¹³ "[t]he rule has been relaxed only to the extent that dual representation of a creditor of the same class and the committee is not automatically prohibited."¹¹⁴ In *Whitman*, the court refused to allow the attorney for a creditor holding both secured and unsecured claims to represent the unsecured creditors' committee as well. The court concluded that such dual representation constituted, as a matter of law, a conflict of interest prohibited under subsection 1103(b).¹¹⁵

109. See, e.g., *In re Combustion Equip. Assoc.*, 8 Bankr. 566, 568 (S.D.N.Y. 1981) (prohibiting representation of both individual committee member and committee as a whole); *In re Proof of the Pudding, Inc.*, 3 Bankr. 645, 648 (S.D.N.Y. 1980) (prohibiting representation of more than one committee in related proceedings).

110. United States Bankruptcy Judge Ryan described the concern as follows:

To avoid the manifestation of this conflict would serve both the interests of the parties as well as the integrity of this court. Neither the appointment of special counsel once the conflicts materialize, nor the resignation of [the firm] (as they so willingly provide in their affidavits supporting their respective applications) would be as suitable as denying the creditors' applications in the first instance.

Proof of the Pudding, 3 Bankr. at 647. Although intended to avoid conflicts of interest, former section 1103(b) often hindered the committee's efforts to obtain competent counsel and often unnecessarily increased the expenses of administration. *In re Whitman*, 101 Bankr. 37, 38 (N.D. Ind. 1989).

111. Although the Code fails to define an "interest adverse," the courts have spoken at length on the phrase's meaning. See, e.g., *In re Grant Broadcasting, Inc.*, 71 Bankr. 655, 664 (E.D. Pa. 1987). Section 327(a) of the Code, which allows the trustee, with the court's approval, to employ professional persons, employs the same "interest adverse" language and adds the requirement of disinterestedness. 11 U.S.C. § 327(a) (1988).

112. 11 U.S.C. § 1103(b) (1988). Once the applicant for appointment states that it meets the 1103(b) threshold, the burden rests with the party objecting to the appointment to prove the contrary. *In re AOV Indus., Inc.*, 798 F.2d 491, 495-96 (D.C. Cir. 1986).

113. 101 Bankr. 37 (N.D. Ind. 1989).

114. *Id.* at 38; see also, *In re Grant Broadcasting, Inc.*, 71 Bankr. 655 (E.D. Pa. 1987); *In re Lion Capital Group*, 44 Bankr. 684 (Bankr. S.D.N.Y. 1984) (prior representation of unofficial committee not a bar to representation of statutory committee of unsecured creditors).

115. In denying the dual representation, the court also pointed to the "dramatically different" interests of the secured and unsecured creditors. *Whitman*, 101 Bankr. at 38.

The issue of when committees may employ professionals who also represent individual creditors has been litigated frequently during recent years. In *In re Rusty Jones, Inc.*,¹¹⁶ the creditors' committee sought to employ a law firm which also represented individual creditors in claims against the debtor. The Bankruptcy Court for the Northern District of Illinois rejected the debtor's contention that the law firm was not "disinterested" within the meaning of subsection 101(13)(E) because it held an "adverse interest" as prohibited in subsection 1103(b).¹¹⁷ Absent a showing of an actual or likely conflict of interest between the individual creditors and the committee as a whole, the court refused to bar the dual representation.¹¹⁸

An attorney who violates the proscription of subsection 1103(b) may risk the court's denial of compensation under subsection 328(c) of the Code.¹¹⁹ The court may also deny compensation in other instances.¹²⁰ For example, counsel may not be paid for administrative work, such as drafting notices to creditors, notifying creditors of meetings, and drafting reports of creditors' committees.¹²¹ Courts may also deny compensation to committee counsel who performs services prior to the committee's obtaining court approval for the employment. Although some courts have allowed retroactive

116. 107 Bankr. 161 (Bankr. N.D. Ill. 1989).

117. *Id.* at 165.

118. The issue of whether a conflict of interest exists has been frequently litigated. See, e.g., *AOV Indus.*, 798 F.2d 491; *In re Davenport Communications, Ltd. Partnership*, 109 Bankr. 362 (S.D. Iowa 1990); *Whitman*, 101 Bankr. 37 (attorney for creditor holding both secured and unsecured claims barred from serving as attorney for unsecured creditors' committee); *In re Oliver's Stores, Inc.*, 79 Bankr. 588, 594 (D.N.J. 1987) (quoting American Bar Association Annotated Model Rules of Professional Conduct, ABA Model Rule 1.7 (conflict of interest) (comment on loyalty to a client), p.73 (1984)); *Grant Broadcasting*, 71 Bankr. 655 (denying dual representation of individual creditor and committee if individual creditor hired counsel to litigate issues potentially adverse to other committee members); *In re UNR Indus.*, 71 Bankr. 467 (Bankr. N.D. Ill. 1987).

119. Attorneys and other professionals employed by the creditors' committee are paid from the debtor's estate pursuant to subsections 330(a) and 503(b). Subsection 503(b)(4) also provides for the payment of attorneys for prepetition unofficial creditors' committees. *In re Medical Gen., Inc.*, 17 Bankr. 13, 14 (D. Minn. 1981). But see *In re Jensen-Farley Pictures, Inc.*, 47 Bankr. 557 (Bankr. D. Utah 1985) (the court, notwithstanding subsection 503(b), denied attorneys' and accountants' fees incurred by prepetition creditors' committee due to failure to show services performed during unsuccessful nonbankruptcy workout provided direct benefit to estate).

120. Although subsection 328(a) authorizes the committee to hire professionals on any reasonable terms and conditions, the section also authorizes the court to modify the professionals' compensation if, after the conclusion of the employment, the "terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a) (1988). In addition, the court may deny compensation if the professional person is not a "disinterested person" or represents or holds an interest adverse to the estate with respect to the matter on which the professional is employed. *Id.* § 328(c).

121. See *In re Barsky*, 17 Bankr. 396, 397 (Bankr. E.D. Pa. 1982).

approval and thus compensation in cases where extraordinary circumstances beyond the professional's control prevented prior approval,¹²² *nunc pro tunc* orders are generally disfavored and courts have denied compensation for unauthorized services, even where the services were rendered to the committee in good faith.¹²³

All requests for compensation are subject to court approval and must be reasonable in light of the circumstances relating to the particular case. Compensation requests are evaluated pursuant to the criteria set forth in Section 330 of the Code.¹²⁴ These criteria include the time, nature, extent, and value of such services, as well as the cost of comparable services in a non-bankruptcy case.¹²⁵ In *In re Frontier Airlines, Inc.*,¹²⁶ the Bankruptcy Court for the District of Colorado allowed the interim fees of a New York law firm representing the creditors' committee in a Colorado case. The court not only found that the employment of New York counsel was reasonable in light of the complex nature of the case, but also allowed counsel to base his fees on the rate charged in New York, the locale where he ordinarily practiced.¹²⁷ In *In re Bible Deliverance Evangelistic Church*,¹²⁸ the court rewarded counsel for the creditors' committee for his efforts by awarding twice his standard hourly rate. The court justified the bonus on the basis of the active role counsel played in investigating the debtor's busi-

122. See, e.g., *In re Arkansas Co.*, 798 F.2d 645, 650 (3d Cir. 1986); *In re Brown*, 40 Bankr. 728, 731 (D. Conn. 1984) (recognizing court's power to grant retroactive approval in rare or exceptional circumstances not including the neglect of the professionals); see also *In re Triangle Chems., Inc.*, 697 F.2d 1280 (5th Cir. 1983) and *In re King Electric Co.*, 19 Bankr. 660 (E.D. Va. 1982) (suggesting counsel's inadvertence may constitute excusable neglect sufficient to warrant retroactive approval); *In re Freehold Music Center, Inc.*, 49 Bankr. 293 (D.N.J. 1985) (accountant's employment authorized *nunc pro tunc*); *In re Bible Deliverance Evangelistic Church*, 39 Bankr. 768 (E.D. Pa. 1984) (exceptional circumstances warranted *nunc pro tunc* order).

123. See, e.g., *In re Whitmere Dev. Corp.*, 65 Bankr. 734 (Bankr. D.N.J. 1986); *In re Bear Lake W., Inc.*, 32 Bankr. 272 (D. Idaho 1983); *In re Lewis*, 30 Bankr. 404 (E.D. Pa. 1983).

124. 11 U.S.C. § 330 (1982 & Supp. 1988).

125. 11 U.S.C. § 330(a)(1) (1982 & Supp. 1988).

126. 74 Bankr. 973 (D. Colo. 1987).

127. *Id.* at 977; *Jensen-Farley*, 47 Bankr. at 579; see also *In re Atlas Automation*, 27 Bankr. 820 (Bankr. E.D. Mich. 1983). But see *In re Nova Real Estate Invest. Trust*, 25 Bankr. 252 (E.D. Va. 1982) motion for reconsideration granted in part, overruled in part, 30 Bankr. 347 (New York City counsel denied compensation at New York City rates if competent local counsel was available); *In re International Coins & Currency, Inc.*, 26 Bankr. 256, 260 (D. Vt. 1982). The *Frontier* court further allowed reimbursement of necessary travel time as well as time for conferences held during meals. *Frontier*, 74 Bankr. at 978-79. See also *In re Toy & Sports Warehouse, Inc.*, 10 C.B.C.2d 847 (Bankr. S.D.N.Y. 1984). Cf. *In re Windsor Communications Group, Inc.*, 54 Bankr. 504, 509 (E.D. Pa. 1985) (the court denied committee counsel reimbursement for the cost of refreshments and lunches provided at conferences of creditors and parties in interest, finding such costs personal expenses not properly chargeable to the estate under section 330).

128. 39 Bankr. 768 (E.D. Pa. 1984).

ness and in negotiating a settlement in which all unsecured creditors were paid in full.¹²⁹ The court concluded that counsel should receive a bonus above the normal billing rate if "the attorney's skill, diligence and experience so merit, or if the results obtained were particularly favorable in view of the obstacles presented."¹³⁰

To a certain extent, compensation awarded to professionals may also depend upon the nature of the estate, even if the services provided otherwise meet the requirements of Section 330. In *In re S & S Industries, Inc.*,¹³¹ a Michigan bankruptcy court refused to require a secured creditor to pay the fees of counsel to the creditors' committee when there were no unencumbered assets in the estate. Rejecting the committee's request that the court apply subsection 506(c) of the Code, which permits a trustee to receive from a secured creditor reimbursement of expenses incurred in preserving the collateral, the court held, "[S]ection 506(c) enables a trustee to recover from a secured creditor the reasonable necessary costs and expenses 'of preserving, or disposing of,' encumbered property 'to the extent of any benefit to' such creditor. It does not confer this right upon a creditors' committee."¹³² The court concluded that although a secured party is free to consent to pay such fees, such consent is not to be inferred by mere cooperation with the debtor.¹³³

In *In re 1606 New Hampshire Avenue Associates*,¹³⁴ the Bankruptcy Court for the District of Columbia denied the unsecured creditors' committee's application to employ a law firm under a general retainer to be paid from the estate. Although the court recognized that "appropriate circum-

129. The court also permitted counsel to receive compensation for time spent preparing fee applications. *Id.* at 774.

130. *Id.* at 775; see also *In re Baldwin-United Corp.*, 79 Bankr. 321 (Bankr. S.D. Ohio 1987) (permitting enhancement of "lodestar" fees where case was exceptional and involved inordinate risk of loss); *In re General Oil Distrib., Inc.*, 51 Bankr. 794 (Bankr. E.D.N.Y. 1985) (denying counsel to unsecured creditors' committee a 30% bonus on fees); *In re Wilson Foods Corp.*, 40 Bankr. 118 (Bankr. W.D. Okla. 1984) (permitting counsel a bonus of 15% over "lodestar" amount).

131. 30 Bankr. 395 (Bankr. E.D. Mich. 1983).

132. *Id.* at 397 (citation omitted) (quoting 11 U.S.C. § 506(c) (1982). Accord *In re New England Carpet Co.*, 28 Bankr. 766, 771 (Bankr. D. Vt. 1983), *aff'd*, 38 Bankr. 703, *aff'd per curiam*, 744 F.2d 16 (2d Cir. 1984). But see *In re Codesco, Inc.*, 15 Bankr. 354, 355-56 (Bankr. S.D.N.Y. 1981) (court suggested that if committee counsel had benefited the secured creditor, compensation would be appropriate under 11 U.S.C. § 506(c) (1982)).

133. *S & S Indus.*, 30 Bankr. at 398. But see *In re Wilson Freight Co.*, 21 Bankr. 398 (S.D.N.Y. 1982) (court awarded interim compensation to committee counsel in an "under-secured" Chapter 11 in which assets were less than the secured debt where the secured creditor ignored the bankruptcy judge's suggestion that the case be converted to a liquidation under Chapter 7).

134. 96 Bankr. 406 (D.C. 1989).

stances" might warrant such action, it denied the request due to insufficient funds in the estate.¹³⁵ However, where funds in the estate exceed the amount of secured claims, committee counsel may be paid even if the unsecured creditors receive no distribution pursuant to a plan of reorganization. In *In re Joyanna Holitogs, Inc.*,¹³⁶ a New York bankruptcy court awarded interim compensation¹³⁷ to counsel for the unsecured creditors' committee, although no distribution to unsecured claimants was probable.¹³⁸ The court noted that committee counsel is indispensable in every Chapter 11 proceeding where there are unsecured creditors, regardless of how much such creditors receive pursuant to a plan. It is only after proper investigation spearheaded by diligent counsel that a committee can evaluate a plan that provides little or nothing to unsecured creditors. The court concluded that to deny compensation to committee counsel because the creditors will not fare well will discourage the investigation which is crucial in determining whether a plan is feasible.¹³⁹

Finally, even though subsection 1103(a) does not specifically require a person to be disinterested as defined in the Code, courts can refuse to compensate professionals for services rendered and to reimburse them for expenses incurred if, at any time during the employment, the professional person is not a "disinterested person"¹⁴⁰ or if the professional holds or represents "an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."¹⁴¹ However, a professional who adequately discloses his or her "interest" and receives the prior approval of the court may be able to serve the committee and receive proper compensation.

135. *Id.* But see *In re Structurlite Plastics Corp.*, 91 Bankr. 813, 817-18. (Bankr. S.D. Ohio 1988) (debtor not required to pay retainer to counsel for creditor's committee).

136. 19 Bankr. 406 (Bankr. S.D.N.Y. 1982).

137. Section 331 permits counsel to seek interim compensation once every 120 days after the entry of an order for relief or more frequently if the situation warrants. See *In re ICS Cybernetics, Inc.*, 97 Bankr. 736 (Bankr. N.D.N.Y. 1989); *In re Flagstaff Foodservice Corp.*, 739 F.2d 73 (2d Cir. 1984); *In re American Int'l Airways, Inc.*, 47 Bankr. 716 (E.D. Pa. 1985); *In re UNR Indus.*, 30 Bankr. 613 (N.D. Ill. 1983).

138. *Joyanna Holitogs*, 19 Bankr. at 408. But see *In re Chips 'N Twigs, Inc.*, 58 Bankr. 109, 111 (E.D. Pa. 1986) (court denied committee's counsel's request for interim compensation to be paid in full when estate contained insufficient assets to pay all other administrative expenses in full).

139. *Joyanna Holitogs*, 19 Bankr. at 408.

140. 11 U.S.C. 101(13) defines "disinterested person." *Jensen-Farley*, 47 Bankr. at 579; see also *In re South Pac. Island Airways*, 68 Bankr. 574, 578 (D. Hawaii 1986) (denying all compensation to creditors committee's attorney who failed to disclose potential conflict of interest arising from attorney's prior representation of debtor in matters related to bankruptcy).

141. 11 U.S.C. § 328(c) (1988).

The courts are sharply divided as to whether the attorney-client privilege exists between the creditors' committee and its attorney chosen pursuant to subsection 1103(b).¹⁴² In *In re Baldwin-United Corp.*,¹⁴³ the United States Bankruptcy Court for the Southern District of Ohio allowed the creditors' committee to assert the attorney-client privilege.¹⁴⁴ However, as against its constituent creditors, the court required the committee to bear the burden of showing good cause for not disclosing privileged information.¹⁴⁵ The court rejected the argument that the privilege was in all cases "inimical" to the committee's duty to provide the creditors with information, and stated that "[t]he purposes underlying the privilege have no less applicability to a creditor's committee than they do to any other entity, at least when disclosure of privileged communications is sought by those who are not represented by the committee, or who stand in an adversarial relationship with it."¹⁴⁶

In contrast, the United States Bankruptcy Court for the Northern District of California, in *In re Christian Life Center*,¹⁴⁷ found that no attorney-client privilege existed between a committee and its lawyer. The court stated that although a trustee is a "mover and a shaker,"¹⁴⁸ a committee has no power other than to consult, investigate, and recommend. Therefore, the committee should make its activities known to other creditors.¹⁴⁹

142. The courts are also divided as to whether a lawyer-client relationship exists between the attorney for the creditors' committee and individual committee members. Compare *In re Levy*, 54 Bankr. 805 (S.D.N.Y. 1985) (refusing to find such a relationship) with *Pension Benefit Guar. Corp. v. Pincus, Verlin, Hahn, Reich & Goldstein Professional Corp.*, 42 Bankr. 960 (E.D. Pa. 1984).

143. 38 Bankr. 802 (Bankr. S.D. Ohio 1984).

144. The court also found that the presence of nonvoting members during the committee's discussions with its counsel did not threaten the privileged nature of such communications. *Id.* at 806; see Weintraub & Resnick, *Creditors' Committee Compensation — Avoiding Attorney-Client Privilege Conflict*, 20 U.C.C. L.J. 288 (Winter 1988); see also *In re Astri Inv. Management & Sec. Corp.*, 88 Bankr. 730, 791 (D. Md. 1988) (newspaper enjoys first amendment right of access to creditors' meeting unless specific evidence shows debtor would be less forthcoming in presence of press, or presence of outside parties would interfere with orderly administration of proceeding).

145. In striking the balance between the creditors' need for information and the committee's need for confidentiality, the court noted the unique nature of the committee's relationship to the creditors it represents as well as the creditors' dependence on the committee for information. The court analogized the committee's fiduciary duty to its constituent creditors to a corporation's duty to its shareholders and applied principles from the corporation-shareholder balancing test stated in *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

146. *Baldwin-United*, 38 Bankr. at 804-05.

147. 16 Bankr. 35 (Bankr. N.D. Cal. 1981). The *Baldwin-United* court specifically declined to follow the prohibition against asserting the privilege stated in *Christian Life Center*.

148. *Id.* at 37.

149. *Id.*

The 1981 case of *Christian Life* preceded much of the case law concerning a committee's standing to sue and to intervene in a case.¹⁵⁰ It is unclear whether these recently emerging "powers" would cause the *Christian Life* court to see the creditors' committee as a "mover and shaker" deserving of the privilege.

Christian Life may also be distinguished on its facts. The case involved allegations which the *Baldwin-United* court agreed would bar the assertion of the attorney-client privilege.¹⁵¹ Given the broad powers Congress granted committees through subsection 1103(c) and the influential role many committees play by bringing suits or intervening in a case, allowing them the protections afforded by the attorney-client privilege, as outlined by the court in *Baldwin-United*, is the better reasoned view. Any other result could seriously hamper the committee's ability to effectively participate in the reorganization process.

B. General Powers of a Committee

To enable a committee to carry out its role as a "watchdog"¹⁵² of the debtor's reorganization and to contribute to the formulation of a plan, Congress granted committees of creditors or interest holders the following powers and duties:

- (c) A committee appointed under section 1102 of this title may —
 - (1) consult with the trustee or debtor in possession concerning the administration of the case;
 - (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
 - (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

150. See *infra* notes 168-200 and accompanying text.

151. *Baldwin-United*, 38 Bankr. at 805, n.1 (attorney-client "privilege can never be asserted as a shield to protect against disclosure of fraud or other misconduct on the part of the committee or its attorneys").

152. In *In re AKF Foods, Inc.*, 36 Bankr. 288 (Bankr. E.D.N.Y. 1984), the court stated that "[t]he function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents." *Id.* at 289. For a discussion of the committee's role as "watchdog," see Andrews, *The Chapter 11 Creditors' Committee: Statutory Watchdog?*, 2 BANKR. DEV. J. 247 (1985).

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.¹⁵³

As subsection 1103(c) suggests, a committee's role is to advise, not control, the debtor.¹⁵⁴ In *In re UNR Industries, Inc.*,¹⁵⁵ the United States Bankruptcy Court for the Northern District of Illinois declined to order the debtor to give the committee prior notice before implementing certain management decisions.¹⁵⁶ Noting that the Code empowers a debtor in possession in a Chapter 11 proceeding to continue its operations without day-to-day input from creditors, the court concluded that if the committee believes that the debtor is not capable of proper management, the appropriate remedy is to move for the appointment of a trustee pursuant to Code subsection 1103(c)(4) and Section 1104.¹⁵⁷

Committees are granted the broad power under subsection 1103(c)(2) to investigate the operations and financial affairs of the debtor. As noted previously, such investigation is crucial to the committee's ability to make an informed decision about the feasibility of a reorganization plan.¹⁵⁸ In a decision which opens the door to an expansive reading of the committee's power to conduct such an investigation, the Eleventh Circuit Court of Ap-

153. 11 U.S.C. § 1103(c) (1988). As soon as practical after the U.S. Trustee appoints a committee under Section 1102, the Code directs the U.S. Trustee to meet with the committee "to transact such business as may be necessary and proper." *Id.* § 1103(d). Congress granted the committee many of the same powers as it granted the Section 1104 trustee. However, the committee "may" engage in the activities enumerated in subsection 1103(c), but the Code directs that the Section 1104 trustee "shall" exercise its enumerated powers. In cases where their roles overlap, the Section 1104 trustee and committee should coordinate their efforts to minimize expense and avoid duplication. See COLLIER, *supra* note 31, ¶ 1103.07, at 1103-18 to 19, suggesting that despite the use of the word "may" a committee's exercise of its subsection 1103(c) duties is "not necessarily permissive," and committees have a duty to meet and monitor the debtor's activities.

154. COLLIER, *supra* note 31, ¶ 1103.07[3], at 1103-22; see also *In re Johns-Manville Corp.*, 52 Bankr. 879, 883-84 (S.D.N.Y. 1985), *aff'd*, 60 Bankr. 842 (S.D.N.Y. 1986), *rev'd on other grounds*, 801 F.2d 60 (2d Cir. 1986), *on remand*, 66 Bankr. 517 (S.D.N.Y. 1986); *Pension Ben. Guar. Corp.*, 42 Bankr. 960 (E.D. Pa. 1984). The Code imposes upon the debtor in possession the duty to meet with the creditors' committee as soon as practicable after the committee is appointed to transact such business as may be necessary and proper. 11 U.S.C. § 1103(d).

155. 30 Bankr. 609 (Bankr. N.D. Ill. 1983).

156. However, Bankruptcy Rule 2002(i) requires that, unless ordered otherwise by the court, committees must be provided copies of certain notices.

157. *UNR Industries*, 30 Bankr. at 612; see also *In re Vancor S.S. Corp.*, 8 Bankr. 470 (Bankr. S.D.N.Y. 1981).

158. See *supra* note 139 and accompanying text; see also *Structurlite Plastics*, 91 Bankr. at 819 (allowing creditors' committee access to information such as drafts of proposed sale agreements, to enable committee to evaluate and take a stance on potential sale of debtor's assets).

peals held in *In re International Horizons, Inc.*,¹⁵⁹ that there exists no federal accountant-client privilege which can be raised by a debtor to bar a committee's access to necessary financial information. The court cited subsection 1103(c)(2)¹⁶⁰ and concluded that the federal policy in the section precluded the application of any such privilege recognized under state law on the basis of comity.¹⁶¹

Subsection 1103(c)(3) grants a committee the power to participate in the formulation of a plan of reorganization.¹⁶² The committee may propose a plan jointly with the debtor¹⁶³ or, in the event the debtor's exclusive period to file a plan has expired or has been terminated,¹⁶⁴ a committee can propose a separate plan of its own making. The Code further authorizes the committee to advise its constituency about the merits or deficiencies of any plan proposed.¹⁶⁵ Acting in this advisory capacity, a committee can exert considerable leverage in negotiating the terms of a plan with any proponent, and especially with the debtor. A negative determination by a committee will frequently preclude a plan's acceptance¹⁶⁶ or confirmation.¹⁶⁷

C. Standing of a Committee

1. Standing to Commence Legal Actions

Section 1103(c)(5) authorizes committees to "perform such other services as are in the interest of those represented."¹⁶⁸ This broad grant of authority has been interpreted to permit a committee to participate freely in virtually every aspect of a case.¹⁶⁹ However, one question concerning the

159. 7 Collier Bankr. Cas. 2d 584 (11th Cir. 1982).

160. *Id.* at 592.

161. Regarding the committee's attorney-client privilege, see *supra* notes 142-51 and accompanying text.

162. 11 U.S.C. § 1103(c)(3) (1988); see, e.g., *Structurlite Plastics*, 91 Bankr. at 819 (most important aspect of committee's function is to negotiate terms of plan).

163. See generally *In re Gander Mountain, Inc.*, 29 Bankr. 269 (E.D. Wis. 1983); *In re A.C. Williams Co.*, 25 Bankr. 173, 177 (N.D. Ohio 1982).

164. Under 11 U.S.C. § 1121 (1982 & Supp. 1988), only the debtor may file a plan during the first 120 days after the entry of the order for relief, unless the court orders a shorter period upon a showing of cause.

165. 11 U.S.C. § 1103(c)(3) (1982 & Supp. 1988). This section also authorizes the committee to file with the court acceptances or rejections of the plan.

166. See *id.* § 1126.

167. See *id.* § 1129.

168. *Id.* § 1103(c)(5).

169. See, e.g., *In re All Prods. Co.*, 32 Bankr. 811 (Bankr. E.D. Mich. 1983) (committee objected to claims of the debtor's parent company); *In re Huckabee Auto Co.*, 33 Bankr. 132 (M.D. Ga. 1981) (committee objected to plan of reorganization on the basis of improper classification); *In re Flagstaff Food Serv. Corp.*, 16 Bankr. 132 (S.D.N.Y. 1981) (committee objected to a postpetition financing order).

scope of the committee's powers has spawned a significant amount of litigation: whether a committee may institute legal actions in its own name and intervene in actions commenced by others.

The right to commence actions enables committees to exert a considerable degree of control over the Chapter 11 proceeding. Debtors in possession may be reluctant or even unwilling to seek recovery of assets, such as avoidable preferences or fraudulent transfers, from trade creditors whose goodwill may be vital to their post-reorganization prospects.¹⁷⁰ Such reluctance may prejudice the creditor body as a whole. A committee, designed to be a temporary body and charged with ensuring equal treatment for all creditors, may be the ideal party to prosecute such actions. In so doing, the committee may improve the prospects of creditors generally, either by increasing the total distribution creditors receive or, at a minimum, by facilitating a successful reorganization which will cure the financial ills of a valued customer or supplier.

A majority of courts have recognized a committee's standing to sue. Courts disagree, however, over whether that right arises under subsection 1103(c)(5) or under subsection 1109(b) of the Code. Cases that recognize a creditors' committee's implied right to commence adversary proceedings under subsection 1103(c)(5) generally have involved situations where the debtor in possession, or the trustee, unjustifiably refuses to act and the committee obtains the court's prior consent to bring an action.¹⁷¹ In *In re Monsour Medical Center*,¹⁷² a Pennsylvania bankruptcy court found that while the Code contains no express authority permitting a creditors' committee to institute an action, a committee has an implied right to sue to avoid preferences and fraudulent conveyances when the debtor in posses-

170. As Bankruptcy Judge Babitt of the Southern District of New York has put it:

[I]t must surely be well known that Chapter 11 debtors seeking to reorganize and thereby reenter the commercial world are understandably loath to sue those whose support they need post-reorganization. The court here refers to suppliers, servicepeople, lenders and the like and not to a debtor's insiders who have been treated too generously by a debtor on the eve of its bankruptcy petition.

Joyanna Holitogs, 21 Bankr. at 325.

171. Receiving the prior authorization of the court may not always be required. See, e.g., *In re Gander Mountain, Inc.*, 29 Bankr. 260 (E.D. Wis. 1983). But see *In re V. Savino Oil & Heating Co.*, 91 Bankr. 655 (E.D.N.Y. 1988); *In re Nicolet*, 80 Bankr. 733 (E.D. Pa. 1987); *In re Amarex, Inc.*, 36 Bankr. 59 (W.D. Okla. 1984); *In re Toledo Equip. Co.*, 35 Bankr. 315 (N.D. Ohio 1983); *In re Chemical Separations Corp.*, 32 Bankr. 816 (Bankr. E.D. Tenn. 1983). The better approach is to obtain court approval in advance of commencing actions, where possible.

172. 5 Bankr. 715 (Bankr. W.D. Pa. 1980).

sion refuses to act.¹⁷³ However, such refusal is not sufficient to support the appointment of a trustee. The court concluded that any suit instituted must be commenced on behalf of the debtor.¹⁷⁴

Courts have extended the implied right of a committee to sue to causes of action other than those which seek to recover previously transferred assets. Committees have been found to have standing to bring federal anti-trust actions,¹⁷⁵ seek declaratory relief regarding the existence of leases,¹⁷⁶ assert rights in unsold timeshare units,¹⁷⁷ participate in reclamation actions,¹⁷⁸ seek subordination of claims under subsection 510(c) of the Code,¹⁷⁹ bring suit against the debtor's officers and directors for gross negligence, mismanagement and breach of fiduciary duty,¹⁸⁰ and petition for the marshalling of assets.¹⁸¹

Other courts have found that a committee's right to bring actions in its own name is rooted not in subsection 1103(c)(5), but rather in subsection 1109(b).¹⁸² Subsection 1109(b) provides: "A party in interest, including

173. *Id.* at 717; *See also In re Allegheny Int'l, Inc.*, 107 Bankr. 518, 523 (W.D. Pa. 1989); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1363 (5th Cir. 1986); *In re STN Enters., Inc.*, 779 F.2d 901 (2d Cir. 1985).

174. *Monsour Medical Center*, 5 Bankr. at 718-19. When a trustee or debtor in possession is diligently pursuing legal action, committees have been barred from proceeding in their own names. *See, e.g., In re Wesco Prod. Co.*, 22 Bankr. 107 (Bankr. N.D. Ill. 1982); *cf. In re Ludwig Honold Mfg. Co.*, 30 Bankr. 790 (Bankr. E.D. Pa. 1983) (individual creditor held not to have a right to seek subordination of a claim under subsection 510(c) where trustee had already filed a complaint to subordinate).

175. *See, e.g., In re Liberal Mkt., Inc.*, 14 Bankr. 685 (S.D. Ohio 1981).

176. *See, e.g., In re AllBrand Appliance & Television Co.*, 24 Bankr. 125 (S.D.N.Y. 1982). However, a committee has been found not to have the right to move for authority to sell property. *In re Calvary Temple Evangelistic Ass'n*, 47 Bankr. 520, 524 (D. Minn. 1984).

177. *See, e.g., In re Evergreen Valley Resort, Inc.*, 27 Bankr. 75, 76 (D. Maine 1983).

178. *See, e.g., In re Original Auto Parts Distrib., Inc.*, 9 Bankr. 469, 471 (S.D.N.Y. 1981) (adversary proceeding seeking to reclaim goods under subsection 546(c) defended by the creditors' committee without discussion of the appropriateness of the committee's standing).

179. *See, e.g., Chemical Separations*, 32 Bankr. at 819 (relying on 11 U.S.C. § 1109(b) (1982)); *see also In re All Prod. Co.*, 32 Bankr. 811 (E.D. Mich. 1983) (no discussion of committee standing).

180. *See, e.g., In re E.F. Hutton Southwest Properties II, Ltd.*, 103 Bankr. 808 (Bankr. N.D. Tex. 1989); *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988).

181. *In re Ludwig Honold Mfg. Co.*, 33 Bankr. 724 (E.D. Pa. 1983) (no discussion of committee standing).

182. Although the case did not involve the issue of standing in an adversary proceeding, the rights of a committee under subsection 1109(b) were found to include the right to move for rejection of a collective bargaining agreement under Section 365 of the Code. *In re Parrot Packing Co.*, Bankr. L. Rep. (CCH) ¶ 69,372, at 83,131 (N.D. Ind. 1983). The debtor refused to move to reject the collective bargaining agreement because of fear that such rejection would constitute an unfair labor practice under the National Labor Relations Act. Although the debtor actually supported the committee's application to reject, the court found that the debtor's refusal to act was "unjustified." *Id.* at 83,137.

... a creditors' committee ... may raise and may appear and be heard on any issue in a case under this chapter."¹⁸³ Courts that have analyzed subsection 1109(b) sharply disagree over whether the term "case" includes "proceedings" instituted under the Code.

In finding a committee had standing to seek recovery of preferences and allegedly diverted assets, United States Bankruptcy Judge Babitt of the Southern District of New York in *In re Joyanna Holitogs, Inc.*,¹⁸⁴ described a committee's rights under subsection 1109(b) as follows:

Section 1109(b) continues the broad concept, carried over from the 1898 Act, of the broad right to be heard in order to insure that the dark corners of commerce are illuminated. A general right to be heard would be an empty grant unless those who have such right are also given the right to do something where those who should will not. In short, the right to be heard given the creditors' committee, 5 *Collier on Bankruptcy* (15th ed.) ¶ 1109.02 [3], includes the right to sue where a trustee or debtor in possession will not. To hold otherwise would frustrate Congress' decades-old effort to limit a debtor's generosity with its assets.¹⁸⁵

A contrary conclusion was reached by a bankruptcy court in Puerto Rico. In *In re Segarra*,¹⁸⁶ the court held that the term "case," as used in subsection 1109(b), does not apply to adversary "proceedings." The court found that Congress did not intend to create new causes of action in favor of committees and, accordingly, dismissed the committee as a party plaintiff in an action seeking damages from a creditor bank for improper dealings.¹⁸⁷

In those cases where a committee is found to have standing to commence an adversary proceeding, the question arises whether the committee is subject to the concomitant duty to bring suit. In *In re Overmyer*,¹⁸⁸ a New York bankruptcy court pondered this question and concluded that a Chapter 11 trustee seeking to reopen the time to file a complaint objecting to the discharge in the separate Chapter 7 proceedings of the shareholders of the debtor was not prejudiced by the committee's failure to commence the action. Although the court ruled that the committee had a right to commence suit, the committee was not burdened by the correlative duty to

183. 11 U.S.C. § 1109(b) (1988).

184. 21 Bankr. 323 (Bankr. S.D.N.Y. 1982).

185. *Id.* at 326 (citations omitted).

186. 14 Bankr. 870 (D.P.R. 1981).

187. *Id.* at 878.

188. 30 Bankr. 123 (S.D.N.Y. 1983).

do so and its inaction therefore did not estop the trustee from taking action.¹⁸⁹

2. Standing to Intervene

A related question involves the committee's right to intervene in an adversary proceeding already commenced by the debtor in possession or the trustee. The answer to this question often hinges on the court's determination of whether an "adversary proceeding"¹⁹⁰ constitutes an issue in a Chapter 11 "case."¹⁹¹ The circuits are in direct conflict on this question. The Third Circuit Court of Appeals has ruled that a creditors' committee has an unqualified right to intervene. The Fifth Circuit Court of Appeals has held that creditors' committees may not intervene in an adversary proceeding unless grounds for doing so exist under Federal Rules of Civil Procedure 24(a)(2) or 24(b).

In *In re Marin Motor Oil, Inc.*,¹⁹² the Third Circuit Court of Appeals found that "cases" under subsection 1109(b) included adversary proceedings, and held that the creditors' committee had an "unqualified" right to intervene,¹⁹³ particularly when the trustee was lackadaisical in his pursuit of the fraudulent conveyances at issue.¹⁹⁴ The court concluded that the participation of committees envisioned by Congress under subsection

189. *Id.* at 125. The Ninth Circuit Bankruptcy Appellate Panel has also addressed the right of the committee to appeal an adverse decision in *In re General Store*, 11 Bankr. 539 (9th Cir. 1981). The court found that although it was not clear that a creditors' committee as an entity had standing to bring an appeal, the standing of the individual creditors on the committee provided a sufficient basis to permit the appeal to be made. *Id.* at 541; see also *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983) (appeal by committee allowed without discussion of standing).

190. Bankruptcy Rule 7001 defines adversary proceeding.

191. For a discussion of subsection 1109(b), see generally Howell, Hyche & Sapp, *Creditors' Committees' Right to be Heard in Chapter Eleven Reorganization Actions*, 37 MERCER L. REV. 1067 (1986).

192. 689 F.2d 445 (3d Cir. 1982), cert. denied, 459 U.S. 1207 (1983); cf. *Fuel Oil Supply and Terminating*, 762 F.2d 1283 (5th Cir. 1985) (pursuant to Bankruptcy Rule 7024, committee may not intervene in pending adversary proceeding unless grounds exist for doing so under FED. R. CIV. P. 24(a)(2) or (b)).

193. *Marin*, 689 F.2d at 451.

194. See also *In re Lee Way Holding Co.*, 105 Bankr. 404 (S.D. Ohio 1989); *In re D'Lite of Am., Inc.*, 100 Bankr. 612 (N.D. Ga. 1989); *V. Savino Oil & Heating*, 91 Bankr. 655; *In re Longfellow Indus., Inc.*, 76 Bankr. 338 (S.D.N.Y. 1987); *In re Hanover Indust. Mach. Co.*, 61 Bankr. 551 (E.D. Pa. 1986); *In re Parrot Packing Co.*, 42 Bankr. 323 (N.D. Ind. 1983) (court emphasized the committee's role in bringing creditors' concerns into the case in a timely and effective fashion and held that the committee's ability to intervene should not be limited to situations in which the debtor engages in misconduct); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060 (5th Cir. 1986) (creditors' committee right to be heard on determination of venue).

1109(b) went far beyond the amicus curiae status afforded the committee by the bankruptcy court.¹⁹⁵

In contrast, the Fifth Circuit Court of Appeals in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*,¹⁹⁶ declined to follow *Marin* and held that creditors' committees do not have an absolute statutory right to intervene in an adversary proceeding. The *Fuel Oil* court rejected the conclusion that an adversary proceeding is a case subject to subsection 1109(b). Instead, the court held that the Federal Rules of Civil Procedure, which provide for intervention as of right¹⁹⁷ and permissive intervention,¹⁹⁸ govern a committee's motion to intervene in a bankruptcy adversary proceeding.¹⁹⁹ Although it refused to construe subsection 1109(b) as an absolute grant to committees of the right to intervene in adversary proceedings, the court did state that committees have an absolute right to intervene under rule 24(a)(2) if the committee's interests are not represented adequately by other parties.²⁰⁰

D. Reimbursement of Committee Expenses

The courts are sharply divided on the question of a committee member's right to reimbursement of expenses incurred in connection with his or her participation in a Chapter 11 case.²⁰¹ Section 503(b)(3)(D) provides that

195. *Marin* 689 F.2d at 454; see also *In re Allegheny Int'l, Inc.*, 107 Bankr. 518 (W.D. Pa. 1989); *Nicolet*, 80 Bankr. 733; *Hanover*, 61 Bankr. 551; *In re D.H. Sharrer & Son, Inc.*, 44 Bankr. 976 (M.D. Pa. 1984); *Gander Mountain*, 29 Bankr. 260. But see *In re Charter Co.*, 50 Bankr. 57 (W.D. Tex. 1985) (suggesting *Marin* is no longer good law because it was decided prior to the adoption of Bankruptcy Rules 2018 and 7024).

196. 762 F.2d 1283 (5th Cir. 1985).

197. FED. R. CIV. P. 24(a).

198. FED. R. CIV. P. 24(b).

199. Bankruptcy Rule 7024 applies FED. R. CIV. P. 24 to adversary proceedings under the Code. See also *In re Terex Corp.*, 53 Bankr. 616 (Bankr. N.D. Ohio 1985); *Charter*, 50 Bankr. 57; *In re Calvary Temple Evangelistic Ass'n*, 47 Bankr. 520 (D. Minn. 1984); *In re Jermoo's, Inc.*, 38 Bankr. 197 (W.D. Wis. 1984) (creditors' committee had standing to seek continuation of debtor's executory contracts); *In re George Rodman, Inc.*, 33 Bankr. 348 (Bankr. W.D. Okla. 1983).

200. *Fuel Oil Supply*, 762 F.2d at 1287; see also *George Rodman*, 33 Bankr. at 349-50, (the court concluded that the right to intervene is permissive; the court highlighted the distinctions between "case" and "proceeding" under Title 28 of the United States Code and the Bankruptcy Code's separate rules for intervention in a case (Rule 2018) and a proceeding (Rule 7024)).

201. The courts appear to agree that committee members may not receive compensation for their service on a committee or for time spent on matters not of benefit to the debtor's reorganization. See, e.g., *In re Mesta Mach. Co.*, 67 Bankr. 151 (W.D. Pa. 1986) (committee members not entitled to compensation for time spent on development of employee stock ownership plan). For a thorough analysis of the numerous decisions concerning reimbursement, see Pulliam, Yates & Brewster, *Reimbursement of Creditors' Committee Members' Costs and Expenses Under Section 503(b) of the Bankruptcy Code*, 94 COMM. L.J. 93 (1989) [hereinafter Pulliam].

administrative expense priority shall be allowed for actual, necessary expenses incurred by:

(D) a creditor . . . or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of [the Code], in making a substantial contribution in a case under chapter 9 or 11 of [the Code]²⁰²

Thus, an individual creditor or a committee other than a section 1102 committee, which makes a substantial contribution to a case, may receive reimbursement. However, a creditor who chooses to meet Congress's expectation that creditors participate actively in the reorganization process through service on a section 1102 committee is denied reimbursement. As one commentator has suggested, "[t]his result is inequitable; it frustrates the stated Congressional policy of encouraging creditors' participation in reorganization cases"²⁰³

Some courts have interpreted subsection 503(b)(3)(D) to expressly prohibit reimbursement.²⁰⁴ However, a slim majority of the courts allow reimbursement.²⁰⁵ The myriad of cases discussing reimbursement of committee members' expenses put forth widely varying rationales for denying or granting out-of-pocket expenses. A recently published compendium of such cases²⁰⁶ suggests that courts deny reimbursement on the basis of the Code's express prohibition,²⁰⁷ the absence of express statutory authority to grant reimbursement,²⁰⁸ or the failure of committee members to show that they made a "substantial contribution" to the reorganization case.²⁰⁹ Conversely, courts that grant reimbursement do so on the grounds that the Code does not expressly prohibit such action,²¹⁰ a perceived Congressional

202. 11 U.S.C. § 503(b)(3)(D). Former Bankruptcy Rule 1129 authorized reimbursement of expenses under the Act. Counsel to creditors' committees are entitled to compensation under Code subsections 503(b)(2), 328(a), and 330(a).

203. Pulliam, *supra* note 201, at 97.

204. *See, e.g., In re Mason's Nursing Center, Inc.*, 73 Bankr. 360 (S.D. Fla. 1987); *In re Lyons Mach. Co. Inc.*, 28 Bankr. 600 (E.D. Ark. 1983).

205. *See, e.g., In re Aviation Technical Support, Inc.*, 72 Bankr. 32 (W.D. Tex. 1987); *In re White Motor Credit Corp.*, 50 Bankr. 885 (N.D. Ohio 1985); *In re Fireside Office Supply, Inc.*, 17 Bankr. 43 (Bankr. D. Minn. 1981). *See generally* Pulliam, *supra* note 201, at 103.

206. Pulliam, *supra* note 201, at 103..

207. *See, e.g., Mason's Nursing Center*, 73 Bankr. 360; *Lyons Machinery*, 28 Bankr. 600; *In re Major Dynamics, Inc.*, 16 Bankr. 279 (S.D. Cal. 1981).

208. *See, e.g., In re George Worthington Co.*, 76 Bankr. 605 (N.D. Ohio 1987); *Mesta Mach.*, 67 Bankr. 151; *In re Automotive Nat. Brands, Inc.*, 65 Bankr. 412 (Bankr. W.D. Pa. 1986); *Wind-sor Communications*, 54 Bankr. 504; *In re Air Haiti, S.A.*, 46 Bankr. 539 (S.D. Fla. 1985); *Lyons Machinery*, 28 Bankr. at 601-02.

209. *See, e.g., Farm Bureau Services*, 32 Bankr. at 70; *Lyons Machinery*, 28 Bankr. at 602.

210. *See, e.g., Aviation Technical Support*, 72 Bankr. 32; *General Oil Distribs.*, 51 Bankr. 794; *In re Global Int'l Airways Corp.*, 45 Bankr. 258 (Bankr. W.D. Mo. 1984); *In re Grynberg*, 19

intent to permit reimbursement,²¹¹ bankruptcy rule 2016,²¹² public policy considerations and equity principles,²¹³ or a finding that the committee member made a "substantial contribution" to the bankruptcy case.²¹⁴

Bankruptcy courts have taken a hodgepodge of approaches to the issue of reimbursing committee members for out-of-pocket expenses. As a result, creditors are often uncertain where their cases will fall along the spectrum of reimbursement decisions. This uncertainty may play a role in the reluctance of many creditors to serve on Section 1102 committees. Until Congress enacts legislation to remedy the anomalous result produced by the language of subsection 503(b)(3)(D),²¹⁵ counsel should advise their clients of the relevant bankruptcy district's approach to the issue of reimbursement and should, at the outset of the case, seek an order from the court clarifying committee members' rights to reimbursement.

E. Duties and Potential Liabilities of Committee Members

1. The Standard of Care: Fiduciary Responsibility

Members of a creditor's committee owe a fiduciary duty to the holders of the class of claims or interests they represent.²¹⁶ Committee members must pursue their statutory function for the benefit of their constituency

Bankr. 621 (Bankr. D. Colo. 1982) (interpreting subsection 503(b)(3)(D) as barring reimbursement of a committee's expenses but allowing reimbursement of committee members' expenses).

211. See, e.g., *In re J.E. Jennings, Inc.*, 96 Bankr. 500 (E.D. Pa. 1989); *In re Northeast Dairy Co-op Fed'n, Inc.*, 76 Bankr. 914 (Bankr. N.D.N.Y. 1987); *Global Int'l Airways*, 45 Bankr. 258; *In re GHR Energy Corp.*, 35 Bankr. 539 (Bankr. D. Mass. 1983). See generally Chassin, 1 BANKR. DEV. J. 107, 120 (1984).

212. Rule 2016(a) does not specifically refer to creditors' committees. However, the Advisory Committee Note suggests that the drafters of the Rule intended to include reimbursement of a committee's expenses. The Advisory Committee Note to Bankruptcy Rule 2016(a) reads, in pertinent part, as follows: "Subdivision (a) includes within its provisions a committee member thereof, agent, attorney or accountant for the committee when compensation or reimbursement of expenses is sought from the estate." Bankr. R.P. 2016 Advisory Committee Note. See, e.g., *In re Malden Mills, Inc.*, 42 Bankr. 476 (Bankr. D. Mass. 1984); *GHR Energy*, 35 Bankr. 539; *In re Pennsylvania Tire & Rubber Co.*, 25 Bankr. 18 (N.D. Ohio 1982); *Fireside Office Supply*, 17 Bankr. 43.

213. See, e.g., *In re Kaiser Steel Corp.*, 74 Bankr. 885 (Bankr. D. Colo. 1987); *Malden Mills*, 42 Bankr. 476; *GHR Energy*, 35 Bankr. 539.

214. See, e.g., *Kaiser Steel*, 74 Bankr. 885; *In re Food Workshop, Inc.*, 70 Bankr. 962 (Bankr. S.D.N.Y. 1987); *In re Evans Prods. Co.*, 62 Bankr. 579 (S.D. Fla. 1986); *Windsor Communications Group*, 54 Bankr. 504.

215. Repeated efforts to address the issue through a Technical Amendments Act, which would specifically authorize reimbursement of committee expenses, have proven unsuccessful.

216. See, e.g., *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941); *Bohack Corp. v. Gulf & W. Indus., Inc.*, 607 F.2d 258 (2d Cir. 1979); *In re Realty Assocs. Sec. Corp.*, 56 F. Supp. 1008 (E.D.N.Y. 1944), *aff'd*, 156 F.2d 480 (2d Cir. 1946); *Mesta Mach.*, 67 Bankr. at 156; *In re REA Holding Corp.*, 8 Bankr. 75 (S.D.N.Y. 1980). See generally DeNatale, *The Creditors' Com-*

with an undivided loyalty.²¹⁷ Because of this absolute requirement, some courts have refused to appoint overlapping committees,²¹⁸ and others have declined to approve the selection of the same counsel for different committees in related cases.²¹⁹ The potential for conflicts of interest is to be scrupulously avoided, even if no actual conflict exists at the time committee members are initially appointed or counsel is retained.²²⁰

As a fiduciary, a committee member must not use his or her position to further personal interests at the expense of other creditors.²²¹ If a committee member does abuse the fiduciary trust by promoting personal interests over those of the committee,²²² courts will not hesitate to impose sanctions. Illustrative is *In re Johns Manville Corp.*,²²³ where a member of the Asbestos Committee, who was also an attorney, continued a prepetition lawsuit against the debtor on behalf of a private client. The bankruptcy court, after condemning the creditor's attempts to advance prepetition claims at the postpetition stage without first securing relief from the automatic stay,²²⁴ commented at length upon the nature of a committee member's fiduciary duty:

In the case of reorganization committees, these fiduciary duties are crucial because of the importance of committees. Reorganization committees are the primary negotiating bodies for the plan of reorganization. They represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituents' interests. . . .

Accordingly, the individuals constituting a committee should be honest, loyal, trustworthy and without conflicting interests, and with

mittee Under the Bankruptcy Code - A Primer, 55 AM. BANKR. L.J. 43 (1981); Levy, *Creditors' Committees and Their Responsibilities*, 74 COMM. L.J. 355 (1969).

217. *In re Johns-Manville Corp.*, 26 Bankr. 919, 925 (Bankr. S.D.N.Y. 1983).

218. See, e.g., *White Motor Credit*, 18 Bankr. at 722; cf. *supra* notes 99-100 and accompanying text.

219. See, e.g., *Proof of the Pudding*, 3 Bankr. at 648.

220. *Id.* at 647.

221. See, e.g., *In re National Equip. & Mold Corp.*, 33 Bankr. 574 (Bankr. N.D. Ohio 1983); *Johns-Manville*, 26 Bankr. 919; see also *In re Enduro Stainless, Inc.*, 59 Bankr. 603, 605 (N.D. Ohio 1986) (the court stated that the union may not act through the committee to further only its self-interests).

222. If a committee member's actions are challenged, the member as a fiduciary, must prove that the challenged transaction was made in good faith; the member must also show the transaction's "inherent fairness from the viewpoint of those that the fiduciary represents." *Mesta Mach.*, 67 Bankr. at 157, (citing *Pepper v. Litton*, 308 U.S. 295 (1939)).

223. 26 Bankr. 919 (Bankr. S.D.N.Y. 1983).

224. The automatic stay, imposed by 11 U.S.C. § 362 (1982), stays, *inter alia*, acts to obtain property of the estate or from the estate.

undivided loyalty and allegiance to their constituents. . . . Conflicts of interest on the part of representative persons or committees are thus not be [sic] tolerated. . . . [W]here a committee representative or agent seeks to represent or advance the interest of an individual member of a competing class of creditors or various interests or groups whose purposes and desires are dissimilar, this fiduciary is in breach of his duty of loyal and disinterested service.²²⁵

The court concluded that the committee member misused confidential committee information in furthering a private cause and stated that such abuse constituted a breach of the member's fiduciary duty. The court fined the attorney and his law firm the amount of compensatory damages caused by their misconduct, not to exceed \$5,000.²²⁶

The scope of a committee member's fiduciary duty and the possible immunity the Code provides to committee members was at issue in *In re Tucker Freight Lines, Inc.*²²⁷ In *Tucker*, a debtor and an unsecured creditor sued individual members of the creditors' committee, alleging that the members made false and misleading statements in the committee's letter to its constituents. The letter recommended that the creditors reject the debtor's plan of reorganization and, as alleged by the debtor, resulted in the plan's denial and the eventual conversion of the case to a Chapter 7 liquidation proceeding. The debtor alleged that the committee members engaged in a "fraudulent scheme" in violation of their fiduciary duties, the Securities Exchange Act of 1934,²²⁸ and the popular Racketeer Influence and Corrupt Organizations Act ("RICO").²²⁹ In response, the committee members asserted that subsection 1103(c) of the Code shielded them with an absolute immunity for actions they took while serving on the committee.²³⁰

225. *Johns-Manville*, 26 Bankr. at 925 (citations omitted).

226. *Id.* at 926; see also *National Equip.*, 33 Bankr. at 575-76 (a union member of the priority creditors' committee petitioned the court to order the debtor, at estate expense, to retract certain adverse statements made about the union prepetition; the court refused and chastised the union for attempting to use its committee membership to further personal interests); *In re Flagstaff Foodservice Corp.*, 14 Bankr. 462 (S.D.N.Y. 1981) (court questioned a committee's attempt to seek reclamation for some, but not all, unsecured creditors).

227. 62 Bankr. 213 (W.D. Mich. 1986).

228. 15 U.S.C. § 78.

229. Title IX of the Organized Crime Control Act of 1970.

230. *Tucker*, 62 Bankr. at 216. The members argued that since their actions were taken pursuant to the Bankruptcy Code and with the court's permission, they should be immune from liability. They further argued that "if the Bankruptcy Code is to function, creditors' committees must share the same absolute immunity held by judges and trustees." *Id.* The court responded that the committee's letter urging creditors to reject the plan exceeded the scope contemplated by the court and added that the absolute immunity sought by the committee members is not even enjoyed by trustees who may be held personally responsible for intentional wrongs. *Id.* at 216-17.

The *Tucker* court acknowledged that the committee's power to advise creditors of its determinations as to a plan pursuant to subsection 1103(c) may include an implicit grant of limited immunity. However, the court added that subsection 1103(c) imposes a concurrent fiduciary duty which [a]t a minimum, . . . requires that the committee's determinations must be honestly arrived at, and, to the greatest degree possible, also accurate and correct. For a Creditors' Committee to urge rejection of a plan for reasons they knew, or would have known but for their recklessness, to be false would violate this duty and deprive them of any limited immunity they might otherwise hold under § 1103(c)(3).²³¹

Surprisingly, few decisions under the Code impose liability on committees or their members for failing to exercise the statutory powers that enable committees to participate actively in the reorganization process.²³² Perhaps the same apathy and sense of hopelessness which often results in inactive committees also produces creditors who fail to consider whether the committee properly represented their interests. Even if a creditor chooses to pursue a claim against an inactive committee, damages may be quite difficult to prove. Establishing that the committee failed to fulfill its fiduciary responsibilities may not, in itself, conclusively demonstrate that a better result would have been achieved if the committee had fully utilized its statutory powers. However, heightened awareness among creditors and their counsel²³³ about the committee's responsibilities to those it represents may result in the emergence of claims against inactive committees and committee members. Such claims might prompt the committee, as well as future committees, to carry out more fully and effectively the role Congress intended them to play in the reorganization process.

2. Securities Law Liability

As stated above, subsection 1103(c)(3) authorizes a committee to participate in the formulation of a plan of reorganization. Once the debtor's

231. *Id.* at 216.

232. The Code fails to define the minimum level of acceptable committee activity. See *Pension Benefit Guar.*, 42 Bankr. at 963 (the court hints that the committee may be liable for its failure to exercise due care in carrying out its statutory duty).

233. Creditors and their counsel may develop a heightened awareness of the committee's role from the publicity received by creditors' committees in national cases during recent years as well as from the renewed attention to creditors' committees which may be precipitated by the U.S. Trustee's active participation in Chapter 11 proceedings. In addition, during the decade since the Code's enactment, creditors and their counsel have become educated as to the Code's complexities and the multifaceted rights of creditors. As a result, creditors may become more inclined to seek redress against inactive committees and their members.

exclusive period to file a plan expires or terminates,²³⁴ a committee may propose a plan on its own or in connection with another party. However, before it seeks acceptances, the committee, as a proponent of the plan, must prepare and the court must approve a written disclosure statement containing "adequate information" about the plan.²³⁵ Upon court approval, subsection 1125(e) absolves a person, who, in good faith and in accordance with the bankruptcy laws, solicits acceptances or rejections of the plan from any liability arising from the "violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale or purchase of securities."²³⁶

This so-called "safe harbor"²³⁷ provision contained in subsection 1125(e) shields a committee or its members who participate in a plan of reorganization from prosecution under any state or federal securities laws. The committee is also shielded from federal antifraud provisions which impose absolute liability upon a seller of securities who makes materially misleading statements or who fails to state a material fact in connection with a sale.²³⁸ However, the "safe harbor" provision may not protect a committee or its members who knowingly prepare or participate in the preparation of a misleading or incomplete disclosure statement. Such actions would fail to meet the good faith requirement the section imposes.²³⁹ Although subsection 1125(e) establishes a good faith requirement, the Code and case authority neither provide guidance to committees seeking to meet the good faith standard nor do they specify what liability a committee or its members may face for failing to meet the standard.²⁴⁰

234. Under U.S.C. § 1121 (1988), only the debtor may file a plan during the first 120 days after the entry of the order for relief unless the court orders a shorter period upon a showing of cause.

235. 11 U.S.C. § 1125 (1988).

236. *Id.* § 1125(e). This section stands alone in the Code in offering committees express protection from liabilities arising out of bankruptcy proceedings.

237. H.R. Rep. No. 595, 95th Cong., 1st Sess., 408-09 at 229 (1977).

238. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78 (1988).

239. 11 U.S.C. § 1125(e) (1982 & Supp. 1988). See also COLLIER, *supra* note 31, § 1125.03[7] at 1125-38 and 39, (suggests that a plan proponent will meet the good faith standard provided its disclosure statement does not contain a "knowing, intentional, material misstatement").

240. The court, upon the request of a party in interest and after notice and a hearing, may designate any entity who fails to exercise good faith in accepting or rejecting a plan or whose acceptance or rejection was not solicited in good faith. 11 U.S.C. § 1126(e) (1982 & Supp. 1988). A committee that elects to vigorously oppose a plan and solicit rejections may run the risk of having the rejections solicited disallowed because they were not solicited in compliance with subsection 1126(e) of the Code. Collier suggests that a plan opponent seek a court order permitting solicitation of rejections to be made on the basis of the proponent's disclosure statement or ask the court to stay the solicitation of acceptances to permit the preparation of any additional disclosure materials which may be required. COLLIER, *supra* note 31, at § 1125.03[7] at 1125-36.

3. Tax Liability

Plans of reorganization often include the creation of creditors' deposit accounts and call for committees to act as agents to administer the funds and distribute dividends to creditors. A pending objection to a claim is but one reason for a delay in the distribution of funds. Such a delay can result in the accrual of interest on the funds prior to distribution. The question arises whether committees must file tax returns and pay tax on the interest earned. Neither the Bankruptcy Code nor the Internal Revenue Code directly addresses this question and there is limited case law on the subject.

In *In re Allen Wood Steel Co.*,²⁴¹ the Bankruptcy Court for the Eastern District of Pennsylvania ruled that a trustee acting as a disbursing agent was not required to file state or federal tax returns or pay tax on the \$300,000 of interest income earned. However, the trustee must have acted pursuant to a Chapter XI plan under the prior Bankruptcy Act. The court reasoned that the money held was actually the property of the class of creditors who were ultimately entitled to receive it and that the interest income belonged to the creditors and not the agent. Additionally, the court ruled that Congress' failure to include disbursing agents in that section of the Internal Revenue Code,²⁴² which requires receivers and trustees to file returns, absolved the agent from any obligation to file.²⁴³

In *In re Goldblatt Bros., Inc.*,²⁴⁴ the creditors' committee sought a declaratory judgment that it was not responsible for paying certain federal or state taxes. The specific objection was to the taxation of interest earned on money held in a creditors' deposit account established pursuant to a plan of reorganization or for filing income tax returns related to the fund. The United States and the State of Illinois moved to dismiss the committee's complaint, arguing that the bankruptcy court lacked jurisdiction to adjudicate the committee's state and federal tax liabilities. The *Goldblatt* court noted that other courts which addressed the taxability of interest on funds

241. 7 Bankr. 697 (Bankr. E.D. Pa. 1980); see also *In re Holywell Corp.*, 85 Bankr. 898 (Bankr. S.D. Fla. 1988) (liquidating trustee not subject to tax liability); *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985) (holding that creditors' trust established to liquidate property not responsible for payment of capital gains tax resulting from sale of property).

242. 26 U.S.C. § 6012(b) (1982).

243. The court also concluded that the agent was absolved from filing information returns under 26 U.S.C. § 6049 (1982) because the disbursing agent was actually an agent of the United States Bankruptcy Court and therefore outside the scope of the section. *Alan Wood Steel*, 7 Bankr. at 702. Since the court's decision, Congress amended this section to require governmental units, which presumably includes the Bankruptcy Court, to file information returns. Thus, the reasoning of *Alan Wood Steel*, regarding the duty to file information returns, is no longer applicable.

244. 106 Bankr. 522 (Bankr. N.D. Ill. 1989).

created pursuant to plans of reorganization had failed to state the basis for their assumption that a bankruptcy court has subject matter jurisdiction over such a proceeding.²⁴⁵ The *Goldblatt* court engaged in an extensive analysis of the bankruptcy court's jurisdiction and concluded that the creditors' deposit account constitutes a crucial component of the debtor's estate over which the court has core jurisdiction. Therefore, the taxability issues related to the account are within the court's subsection 505(a)(1) jurisdiction. The court left unanswered the question of whether, as a matter of law, the committee must pay taxes or file tax returns.

Whether a committee must file tax returns²⁴⁶ and pay tax on earned interest remains an open question. The lack of decisive case law or authority under the Code or the Bankruptcy Tax Act of 1980 suggests that committees which separately or jointly propose plans and which act as disbursing agents should seek to clarify their potential tax liabilities in advance.²⁴⁷

IV. DYNAMICS OF A CREDITORS' COMMITTEE

A. *The Initial Decision to Serve on a Committee*

Creditors frequently view service on a committee as an unwanted burden and fail to recognize the opportunities committee membership presents. A creditor who actively participates in the reorganization process can directly influence the manner and magnitude of the recoupment of a claim which, to the creditor, may constitute a significant asset. As a committee member, a creditor can endeavor to revitalize a debtor who may be a valuable customer. Additionally, committee service may educate a creditor in ways to improve its own internal procedures to minimize its future exposure as a creditor and may prompt a creditor to revise its operations to avoid duplicating the debtor's financial and operational mistakes.

Reluctance to serve on creditors' committees may stem in part from prior experiences with inactive or ineffective committees.²⁴⁸ Creditors, es-

245. *Id.* at 526-27.

246. 26 U.S.C. § 6012(b)(2) or (4) and analogous state statutes.

247. 11 U.S.C. § 1146(d) (1988) permits the court to authorize a proponent of a plan to request an advance legal determination of state or local tax liability related to a plan. In addition, section 505 grants the bankruptcy court jurisdiction to determine the amount or legality of any tax.

248. See Kerkman, *The Debtor in Full Control: A Case for Adoption of the Trustee System*, 70 MARQ. L. REV. 159, 193 (1987), (study examined certain Chapter 11 cases filed in Milwaukee, Wisconsin prior to the adoption of the United States Trustee System and which concluded, among other things, that creditors' committees generally failed to operate effectively); see also LoPucki, *The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?* (Second

pecially in cases that involve relatively few assets, also may be deterred from committee service out of concern that they will not be reimbursed for expenses they incur as committee members.²⁴⁹ Although Congress failed to redress the issue of compensation, recent amendments to the Code may result in increased numbers of creditors serving on committees. Additionally, committees may play a more active part in successful Chapter 11 reorganizations.²⁵⁰

B. Internal Procedures

Although the factors that help committees to achieve success are somewhat elusive, successful committees seem to have several elements in common. One of the key elements to a successful committee is internal structure and procedures. A committee must organize itself internally before it can act effectively. Creditors that organize early in the case and that establish a framework within which the committee will operate can create a powerful voice to air the concerns of all creditors and can greatly influence the course of the debtor's reorganization.

The creditors' committee should elect a minimum of two officers: a chairperson and a secretary. The chairperson should be a person willing to devote the time necessary to catalyze the committee, to make necessary decisions, and to insure that those decisions are promptly implemented. The often changing course of many reorganizations frequently requires the chairperson to contact committee members between regular meetings to discuss and secure votes upon questions which arise. Although a committee may select a chairperson based on the size of the various creditors' claims, a committee is often better served when it selects a chairperson with a proven record of experience with bankruptcy reorganizations or out of court negotiations.

An effective committee secretary also contributes to the overall success of a committee.²⁵¹ The secretary should perform all of the committee ad-

Installment), 57 AM. BANKR. L.J. 247, 250 (1983); *In re B & W Tractor Co.*, 38 Bankr. 613, 615 (E.D.N.C. 1984) (most creditors' committees are "totally inactive and ineffective").

249. See *supra* notes 201-15 and accompanying text. In those jurisdictions in which the courts deny reimbursement to committee members, creditors will be forced to weigh carefully the costs of service, in terms of both time and money, against the potential benefits their participation can produce.

250. See Kerkman, *supra* note 248, at 198-99, finding that, in pilot districts, the United States Trustee's involvement in a Chapter 11 proceeding resulted in a dramatic increase in the level of the involvement of unsecured creditors.

251. At the earliest possible date, the secretary to the creditors' committee should apply for appointment by the court pursuant to 11 U.S.C. § 1103(a) (1988). See *In re J.E. Jennings, Inc.*, 100 Bankr. 749, 753 (E.D. Pa. 1989) (the secretary to the unsecured creditors' committee was

ministrative work.²⁵² He or she should mail notices to creditors, keep and disseminate minutes of meetings, and prepare committee reports. Although in smaller cases a creditor may perform these functions,²⁵³ larger cases may necessitate that an outside party be retained who can devote the necessary time to fulfill this role. It may be possible, for example, to retain employees of trade associations or other related groups, which also may have word processing or data processing capabilities.

A creditors' committee should adopt bylaws, similar to those adopted by a business corporation, to serve as ground rules for the committee's internal operations. The bylaws should cover such subjects as the appointment of alternate committee members, voting procedures, quorums, voting by proxy, and the formation of subcommittees. A committee that adopts bylaws may prevent future disputes or confusion about the effectiveness of actions the committee subsequently takes.

The effective use of subcommittees can greatly enhance the efficiency of a creditors' or interest holders' committee. Subcommittees diffuse the overall workload of a committee and also permit the committee to address several issues at the same time. Examples of common subcommittees include those created to evaluate the debtor's prepetition and postpetition financial condition, to identify and evaluate candidates to acquire the debtor or its assets, to monitor and recommend improvement in the debtor's operating procedures,²⁵⁴ to negotiate the terms of a plan of reorganization or formu-

denied compensation for services performed prior to appointment). *But see In re Interstate Restaurant Systems, Inc.*, 61 Bankr. 945 (S.D. Fla. 1986) (appointing credit adjustment company *nunc pro tunc* as secretary to creditors' committee). *See also In re Kingsway Purchasing, Inc.*, 69 Bankr. 713 (E.D. Mich. 1987) (denying committee's application to employ secretary); *In re Century Mach. Tools, Inc.*, 43 Bankr. 122 (S.D. Fla. 1984) (allowing compensation of committee's secretary).

252. *See In re Barsky*, 17 Bankr. 396 (E.D. Pa. 1982) (the committee counsel was denied compensation for work such as notifying creditors of meetings and drafting meeting reports, which the court held should have been performed by the committee secretary).

253. A creditor who assumes the functions of a secretary may not be entitled to reimbursement of the expenses it incurs in carrying out such a role. *See, e.g., In re Interstate Restaurant Sys.*, 32 Bankr. 103 (S.D. Fla. 1983), (court made clear that only professional persons employed by committees were entitled to fees (as opposed to reimbursement of expenses) and denied a committee's request for compensation of the chairman and secretary).

254. Although much importance is placed on the committee's adversarial relationship with the debtor, committees can provide valuable assistance as well. For example, a committee can greatly enhance a debtor's prospects for success by suggesting ways to improve internal operations. Frequently, the debtor can obtain goods or materials only on a C.O.D. basis, as opposed to dated terms, causing severe cash flow problems. The committee can sometimes alleviate this problem by informing creditors about their rights to an administrative claim for shipments made post-petition, pursuant to 11 U.S.C. § 503 (1988), or by working with the debtor to provide other assurances to shippers such as field warehousing or secured financing arrangements.

late the committee's plan,²⁵⁵ and to identify recoverable assets, such as preferences and other avoidable transfers.²⁵⁶

C. Resolution of Minor Conflicts of Interest

Frequently, creditors on committees may themselves have received preferences or other avoidable transfers. The committee member may understandably be concerned about a breach of its fiduciary duty to all creditors. Should, for example, the member disclose the fact of a potentially avoidable preference, perhaps to its disadvantage? If a member decides to contest the recovery, should its delegate resign? In large cases it is not unusual for large numbers of creditors to have received avoidable transfers. Resignation of their designees could cripple a committee's effectiveness at a crucial stage in the case. Although replacements may be ultimately appointed, the "start up" time required to become familiar with the committee's proceedings may be substantial.

There exist no universal solutions to these questions. However, disruption of committee activities can be avoided where simple avoidance actions, such as preferences, are involved, by a discussion early in the case of the possibility of this situation arising. In addition, to formalize its procedures and provide written notice to all creditors, a committee may want to incorporate a conflict of interest provision into its bylaws.

Assuming that a subcommittee will undertake a comprehensive investigation and produce a report in the event the issue arises, members may be told that disclosures which may be against their interest are neither necessary nor desired. If a subcommittee to investigate preferences is to be formed, its members might consist only of those creditors who are confident they did not receive a preferential transfer. A member who did receive a

255. It is often useful to begin this process as early in a case as possible. A subcommittee can explore such concepts as conditional earnout provisions, the feasibility of sharing the proceeds of any post-reorganization sale of the debtor's stock or assets, or the receipt of securities in connection with the reorganization. After further investigation of the debtor's operations is concluded, the committee should be in a position to formulate a minimum distribution percentage which can be recommended to creditors generally. By defining the minimum criteria to be included in an acceptable reorganization plan, the committee will be in a position to respond promptly to proposals made by the debtor or other parties, or to propose its own plan.

256. In *In re Gander Mountain, Inc.*, 29 Bankr. 269 (E.D. Wis. 1983), the unsecured creditors' committee identified and collected approximately \$1.7 million in preferential transfers, thereby increasing the distribution to unsecured creditors from 55% to over 75%. As part of the collection effort, the committee afforded recipients of preferences a limited opportunity to satisfy their liability by shipping goods, in this case sporting equipment, to the debtor in an amount equal to the recipient's liability but valued at the creditors' wholesale cost. Many creditors chose this option, taking advantage of their normal markup. This permitted the debtor to increase its inventory substantially without adversely affecting cash flow.

questionable transfer should abstain from voting on matters relating to claims against it and probably should excuse itself during the corresponding discussions that relate to such claims. While such procedures may prove workable in the case of relatively simple and routine claims, disputes with a committee member that involve more serious matters may warrant the committee member's resignation.²⁵⁷

D. Committee Meetings

It is important for committees to meet periodically throughout the course of the case. Although much of the substantive work can be accomplished by subcommittees, the committee should periodically meet as a whole to discuss problems and make decisions based upon the recommendations of its subcommittees. However, it may not be essential to meet with absolute regularity. The developments in a case will often dictate the frequency of meetings. When meetings are held, it may be useful to structure them so that a portion is devoted to meeting with and questioning officers of the debtor, or the trustee, about developments in the case. The remainder of the meeting could be held in executive session to take up committee business.

E. The Role of Committee Counsel

Finally, one of the most important elements of a successful committee is the participation of knowledgeable and experienced counsel. Frequently, committee members are businesspeople whose expertise can be applied to maximum advantage only through the assistance of attorneys familiar with reorganization proceedings. In addition to advising the committee about its functions and duties, counsel can greatly assist it in asserting itself in the posturing and leveraging among competing interests that is frequently determinative of the outcome of the case.

V. CONCLUSION

Effective participation of committees of creditors and of other parties in interest in Chapter 11 proceedings should not be limited to the largest "national" cases. The Code grants committees broad powers which, when properly utilized, permit them to play a meaningful and sometimes dominant role in the outcome of cases of any size being administered under the Code. An active committee, represented by experienced, assertive, and in-

257. *But see In re Bennett*, 17 Bankr. 819 (Bankr. D.N.M. 1982) (unproven allegations of fraud were held insufficient cause to deny committee membership to a creditor).

novative counsel, can achieve the optimum result for creditors. Further, the committee can assure that the members will not be called upon later to personally provide that which they should have obtained for those they represent in the Chapter 11 process.

